Home state obligations over multinational corporations in human rights treaties

Home State Obligations over Multinational Corporations in Human Rights Treaties

--With Special Attention to State-owned Corporations

DISSERTATION

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Contents

List of Abbreviations

ACHR	American Convention on Human Rights
BIT	Bilateral Investment Treaty
CEDAW	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child; or Committee on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESC rights	Economic, Social and Cultural Rights
ETO	Extraterritorial Obligation
FDI	Foreign Direct Investments
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC Articles	Articles on Responsibility of States for Internationally Wrongful Acts

MNC	Multinational Corporation
OECD	Organization for Economic Co-operation and Development
UN	United Nations
UNGPs	United Nations Guiding Principles on Business and Human Rights
VCLT	Vienna Convention on the Law of Treaties (1969)
WTO	World Trade Organization

Chapter 1 Introduction

1. Social Problem

Multinational corporations (MNCs) are the main actor in transnational investments.[1] An MNC is usually headquartered in one country and it sets up subsidiaries or branches in other countries. For the purpose of this book, the country where the MNC is headquartered is called a home State; the country in which the foreign direct investments (FDI) of the MNC are made is called a host State. MNCs have brought economic prosperity to host States over the past decades.[2] However, they have also caused problems in relation to human rights. Many MNCs have been criticized for their negative impacts on human rights in host States. For example, Royal Dutch Shell (headquartered in the Netherlands) has been involved in causing environmental pollution and human rights abuses in Nigeria for a long time.[3] Coca Cola and its subsidiaries have been accused of creating severe water shortages for

[1] United Nations Conference on Trade and Development, World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy, p.xvii. A multinational corporation, sometimes also referred to as a transnational corporation/enterprise, is not a strictly legal concept. An MNC usually refers to an enterprise, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision making, permitting coherent policies and a common strategy through one or more decision-making centers, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others. See United Nations Commission on Transnational Corporations, Draft U.N. Code of Conduct on Transnational Corporations, 22 International Legal Materials 192, 1983, p.192.

[2] Selma Kurtishi-Kastrati, *The Effects of Foreign Direct Investments for Host Country's Economy*, 5 EUROPEAN JOURNAL OF INTERDISCIPLINARY STUDIES 26 (2013).pp.27-30.

[3] Fons Coomans, *The Ogoni Case before the African Commission on Human and Peoples Rights*, 52 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 749(2003).p.749. The District Court of the Hague, Friday Alfred Akpan v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria, Judgment of 30 January 2013. Original judgment is available at: http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2013:BY9854 (last accessed 20-4-2016). English translation is available at: https://milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-akpan-vs-shell-oil-spill-ikot-ada-udo/view (last accessed 20-4-2016).para.2.1.

the community in India by extracting large quantities of water for their factories, affecting both the quantity and quality of water available in the host community.[4] People have been aware that MNCs can contribute to human rights abuses in their global operations.[5] The rights that could be negatively affected by MNCs include but are not limited to the right to life, the right to favorable work conditions, the right to form or join trade unions, and the right to health.

There is a trend in international law requiring States to regulate private actors including MNCs.[6] Besides, States are more and more engaged in transnational investments and some MNCs are State-owned corporations. Many State-owned corporations have been rebuked for their bad human rights records.[7] Sometimes governments ask private businesses to respect human rights, but forget to ensure that their State-owned corporations do the same.[8] Adverse human rights impacts caused by State-owned corporations make the topic of business and human rights more and more complicated. What can international law, especially international human rights law, do to solve the human rights problems caused by ordinary MNCs in general, and State-owned corporations in especial?

It is generally accepted that economic globalization may have a negative impact on the protection of human rights.[9] In the process of economic globalization, human rights could be influenced not only by States but also by MNCs. Where a violator of human rights law is not a State or its agent but is, for example, an MNC,

[4] The Rights to Water and Sanitation Website, Case against Coca-Cola Kerala State: India, available at: http://www.righttowater.info/rights-in-practice/legal-approach-case-studies/case-against-coca-cola-kerala-state-india/ (last accessed 2-11-2016).
[5] Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 1 (2003).p.1.
[6] Andrew Clapham and Mariano Garcia Rubio, The Obligations of States with Regard to Non-State Actors in the Context of the Right to Health, WHO Health and Human Rights Working Paper Series No 3, 2002, p.8.
[7] UN Human Rights Council, Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 4 May 2016, A/HRC/32/45, para.16.
[8] UN Report, State-owned Enterprises Must Be 'Role Model' in Respecting Human Rights, 17 June 2016.
[9] Paul O'Connell, *On Reconciling Irreconcilables: Neo-Liberal Globalisation and Human Rights*, 7 HUMAN RIGHTS LAW REVIEW 483(2007). p.484.

international human rights law faces difficulties in providing redress for victims.[10] Although the notion of the obligation to protect human rights has been gradually accepted in human rights discourse, current international human rights law mainly focuses on the responsibility of a State to adopt constitutional, legislative, judicial, administrative, and other measures to ensure that human rights are protected within its territory.[11] In this sense, a host State of an MNC is obliged to prevent MNCs from abusing human rights in its territory. In the situation where a host State is unwilling or unable to take regulatory measures, human rights scholars have proposed direct corporate human rights responsibility under international law.[12] However, it remains unrealistic to enforce corporate human rights responsibility on both international and domestic stage.[13] Do we have other choice to address the problem of business and human rights? Is a home State obliged to prevent MNCs headquartered in its territory from abusing human rights abroad? How can we hold a State accountable for the behavior of its State-owned corporations? Since the adoption of the Universal Declaration of Human Rights in 1948, all UN Member States have ratified at least one core international human rights treaty and 80 percent have ratified four or more.[14] What are the obligations of a home State under a human rights treaty to which it is a State party?

2. Research Questions

In order to fill in the legal gap mentioned above, this book explores home State obligations in human rights law. After the Second World War, the UN human rights treaty system was adopted, which consists of nine core human rights treaties. These

[10] Robert McCorquodale & Richard Fairbrother, *Globalization and Human Rights*, 21 HUMAN RIGHTS QUARTERLY 735(1999). p.764.
[11] Id.
[12] Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 THE YALE LAW JOURNAL 443(2001). p.541. Alice de Jonge, *Transnational Corporations and International Law: Bringing TNCs out of the Accountability Vacuum*, 7 CRITICAL PERSPECTIVES ON INTERNATIONAL BUSINESS 66(2011).
[13] See below section 3.
[14] See the website of the Office of the High Commissioner for Human Rights, available at: http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx (last accessed 1-2-2017).

human rights treaties impose obligations on States. Can we derive a home State obligation from these human rights treaties? In other words, this book aims to answer whether a home State has obligations under human rights treaties to regulate the human rights abuses[15] of MNCs headquartered in that State committed in a host State.

This book focuses on human rights treaties and it does not research other sources of international law such as customary human rights law and general principles of law out of practical considerations. First, the identification of customary international law or general principles of law is a huge project per se. The International Law Commission is currently researching and codifying the method on the identification of customary international law.[16] A recent research has shown that the prevailing international law methodology for identifying principles in municipal law and transforming them into general principles of law is highly unsatisfactory.[17] Second, even if we accept a prevailing idea that the whole or at least a part of provisions in the Universal Declaration of Human Rights have become customary international law, [18] the language used in that declaration concerning the scope of State obligations is not necessarily broader than or substantially different from that of human rights treaties.[19] Due to above considerations, this book concentrates on the interpretation of human rights treaties. However, other sources of law are relevant for the interpretation of human rights treaties.

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[15] For ease of writing, this book uses the term abuse to describe the situation where the enjoyment of human rights is negatively influenced by business. This book does not challenge the traditional conception that human rights can only be violated by States. By contrast, Andrew Clapham has challenged that traditional conception. ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (Oxford University Press. 1993).p.91.

[16] Michael Wood, Fourth Report on Identification of Customary International Law, International Law Commission, Sixty-eighth Session, 8 March 2016, A/CN.4/695.

[17] Jaye Ellis, *General Principles and Comparative Law*, 22 EUROPEAN JOURNAL OF INTERNATIONAL LAW 949(2011).p.970.

[18] Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW 82(1988).pp.90-93.

[19] The Preamble of the Universal Declaration of Human Rights adopts the expression of 'to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction'.

Human rights treaties usually consist of general provisions which indicate general obligations of State parties and specific provisions on a particular right. To answer the question of home State obligations, several sub-questions are also relevant: What is the function of the expression 'individuals within the jurisdiction of a State' in human rights treaties? How to interpret the term 'jurisdiction' in human rights treaties? Is it possible that individuals located in a host State are within the jurisdiction of a home State for the purpose of invoking a human right? Are home State obligations possible if individuals located in a host State are not within its jurisdiction?

In some countries, such as China, State-owned corporations are also leading actors in overseas investments in parallel with ordinary corporations.[20] This phenomenon raises several interesting questions: Does a home State have special obligations for its State-owned corporations that carry out overseas investments? Can the conduct of a State-owned corporation be attributed to the State as owner? In a broader context, the world is curious about whether the peaceful rise of China is possible.[21] In addition, there is also an apprehension in the democratic world about the possible impact of the economic rise of China on the UN human rights agenda.[22] The author of this book takes those worries into consideration in the discourse of business and human rights. Is China, a communist State with elements of capitalism,[23] willing to regulate Chinese overseas investments? How has China regulated human rights abuses committed by Chinese companies abroad?

Before moving on to the methodology part of this book, it is helpful to conduct a literature review of previous research and recent developments on the topic of

[20] Paul Michael Blyschak, *State-Owned Enterprises in International Investment*, 31 ICSID REVIEW 5(2016).p.5.
[21] Barry Buzan, *China in International Society: Is 'Peaceful Rise' Possible?*, 3 CHINESE JOURNAL OF INTERNATIONAL POLITICS 56(2010).p.7.
[22] Surya P. Subedi, *China's Approach to Human Rights and the UN Human Rights Agenda*, 14 CHINESE JOURNAL OF INTERNATIONAL LAW 437(2015).p.437.
[23] Nan Lin, *Capitalism in China: A Centrally Managed Capitalism (CMC) and Its Future*, 7 MANAGEMENT AND ORGANIZATION REVIEW 63(2010).p.63. Shaomin Li, Shuhe Li and Weiying Zhang, *The Road to Capitalism: Competition and Institutional Change in China*, 28 JOURNAL OF COMPARATIVE ECONOMICS 269(2000).p.290.

business and human rights. It also explains some conceptual issues concerning home State obligations in the following parts.

3. Previous Research and Developments

It is not unusual that MNCs contribute to human rights abuses in their global operations. In response to such a problem, some scholars have contended that corporate human rights liability should be established directly under international law to oblige MNCs to respect human rights.[24] This approach, which seeks to impose human rights obligations directly on MNCs in accordance with international law, has been endorsed by soft law such as guidelines and declarations of international organizations over the recent decades.[25] For instance, the concept of corporate human rights liability permeates the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, which only briefly mention the primary responsibility of States (a traditional approach of international law) in the preamble and Article 1.

The emphasis on corporate human rights liability, however, has not enjoyed much success in the current structure of international society, where States remain the dominant actors in international relations. This book does not go against the objective of 'the inclusion of non-State actors in international law',[26] nor does it stand in the way of such a trend. Rather, this book aims to explore other possible approaches to address the problem of human rights abuses by multinational

[24] Iris Halpern, *Tracing the Contours of Transnational Corporations' Human Rights Obligations in the Twenty-first Century*, 14 BUFFALO HUMAN RIGHTS LAW REVIEW 129(2008). Rachel J. Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, 88 DENVER UNIVERSITY LAW REVIEW 183(2010). ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (Oxford University Press. 2006).

[25] International Labor Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 1977 (amended in 2000, 2006, 2017); OECD, Guidelines for Multinational Enterprises, 1976 (latest updated in 2011); United Nations Commission on Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 2003.

[26] Andrea Bianchi, *The Fight for Inclusion: Non-state Actors and International Law*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA (Ulrich Fastenrath, et al. eds., 2011).

corporations. Nevertheless, the reliance on corporate liability alone does not help to solve the problem because it has several shortcomings. First of all, the international responsibility of non-State actors (especially that of corporations) is by no means clear and lacks stronger support than provided by the soft law mentioned above.[27] Although (as an exception) individuals can be held responsible for international crimes,[28] this does not extend to corporations. Even if it could, many human rights abuses by corporations have not reached such a degree (core crimes include: war crimes, crimes against humanity, genocide, and the crime of aggression) as to trigger international criminal responsibility.[29]

It is also difficult to envisage the enforcement of corporate human rights liability on the international level, where judicial mechanisms are devised on a State-centered basis. Of course, there has been some progress in this regard. The proposal for a World Court of Human Rights is a good example. Martin Scheinin has argued for the application of human rights norms to MNCs by establishing a World Court of Human Rights.[30] However, the creation of a World Court of Human Rights ultimately depends on State consent, and its jurisdiction over MNCs is subject to their voluntary acceptance.[31] Furthermore, others have argued that the creation of a World Court for Human Rights is, at the present time, neither desirable, necessary,

[27] Supra note 25. Of course, some new developments should not be overlooked: On 26 June 2014 the Human Rights Council adopted a resolution calling for the establishment of an open-ended intergovernmental working group (the IGWG) 'to elaborate an international legally-binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'. The UN Human Rights Council, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, A/HRC/RES/26/9, 14 July 2014, para.1.

[28] André Nollkaemper, *Concurrence between Individual Responsibility and State Responsibility in International Law*, 52 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 615 (2003).p.639.

[29] ELIES VAN SLIEDREGT, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW (Oxford University Press. 2012). p.5.

[30] Martin Scheinin, *International Organizations and Transnational Corporations at a World Court of Human Rights*, 3 GLOBAL POLICY 488 (2012).p.489.

[31] Id.

nor probable.[32] One may wonder why we need a new regime if we could find an answer to the business and human rights issue in the traditional State responsibility approach. Before turning to the State responsibility approach, we need to explore whether corporate human rights liability can be enforced by domestic judicial systems, because international law can also be applied by a domestic court.

Are domestic judicial mechanisms a better forum to enforce corporate human rights liability? Authors who are in favor of corporate human rights liability seemed to be inspired by the United States Alien Tort Claim Act (ATCA), a 1789 statute which authorizes federal courts to hear civil claims from aliens against a private actor for violations of international law. The ATCA states that: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'[33] In the recent *Kiobel* case, where a debate erupted on whether the jurisdiction granted by the ATCA extends to civil actions brought against corporations for the violation of the law of nations, the Second Circuit court dismissed the plaintiff's compliant, reasoning that the law of nations does not recognize corporate liability.[34] The court has stated that: 'Although international law has sometimes extended the scope of liability for a violation of a given norm to individuals, it has never extended the scope of liability to a corporation.' [35] Therefore, the Second Circuit court's judgment in the *Kiobel* case frustrates the idea that the ATCA mechanism is a good forum to enforce corporate human rights liability.

Finally, the *Kiobel* case came before the US Supreme Court. The US Supreme Court, remaining silent on the issue of corporate liability under international law, affirmed the judgment of the Second Circuit on another basis, namely the presumption against extraterritoriality. The court first pointed out that: 'When a

[32] Stefan Trechsel, *A World Court for Human Rights?*, 1 NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS 3(2004). para.70.
[33] 28 USC § 1350.
[34] United States Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum*. Available at: http://online.wsj.com/public/resources/documents/091710atsruling.pdf (last accessed 15-11-2013).
[35] Id.

statute gives no clear indication of an extraterritorial application, it has none.'[36] It further concluded that: 'The presumption against extraterritoriality applies to claims under the ATS, and nothing in the statute rebuts that presumption.'[37] Therefore, we could not fully rely on the ATCA mechanism to enforce corporate human rights liability, the prospect of which is unclear.

Despite the gloom brought about by the US *Kiobel* case, tort litigations against multinational corporations for the violation of human rights are booming outside the US, in both host States and home States, in accordance with their domestic civil law.[38] These tort cases under domestic law could possibly deter businesses from abusing human rights. However, those tort law remedies could not determine human rights obligations of companies under international law.[39] The feasibility of tort litigation against multinational corporations is ultimately subject to the domestic law of the State of the court and the will of that court as well. Does a State, either a host State or a home State, have obligations to provide remedies to individual victims of corporate abuses? In fact, according to the traditional doctrine of human rights law, it is the duty of States to protect and promote human rights on both domestic and international levels. There is little dispute that a host State has obligations under human rights treaties to regulate multinational corporations operating in its territory in general, including providing remedies to individual victims when a human rights abuse is committed.[40] However, home State obligations are less sure in international law. Although there are some proposals for home State regulation and some home States such as the UK have held a parent

[36] Supreme Court of the United State, *Kiobel v. Royal Dutch Petroleum*. Available at: http://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf (last accessed 15-11-2013).
[37] Id.
[38] Robert McCorquodale, *Waving Not Drowning: Kiobel outside the United States*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 846(2013).p.851. Richard Meeran, *Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States*, 3 CITY UNIVERSITY OF HONG KONG LAW REVIEW 1(2011).p.4.
[39] Menno Kamminga, *Transnational Human Rights Litigation against Multinational Corporations Post-Kiobel*, *in* WHAT'S WRONG WITH INTERNATIONAL LAW? (Cedric Ryngaert, et al. eds., 2015). p.163.
[40] Coomans, Supra note 3, p.760.

corporation accountable for its failure to fulfill its duty of care vis-à-vis the operations of its overseas subsidiaries,[41] whether home State regulation is obligatory under human rights treaties remains an unsettling question.

The UN Guiding Principles on Business and Human Rights (UNGP), which were endorsed by the UN Human Rights Council in 2011, have reemphasized the State responsibility approach for business and human rights issues before affirming corporate responsibility to respect human rights. The commentary to Principle 1 states that: 'States are not per se responsible for human rights abuse by private actors. Nonetheless, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse.'[42] The UNGPs take a very conservative and cautious approach towards the idea of home State responsibility in general. The official commentary to Principle 2 of the UNGPs states that: 'At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.'[43] According to the UNGPs, home State regulation is not obligatory.

A literature review of home State obligations shows that this topic has gradually gained attention in the recent decade. In 2004, Olivier De Schutter pointed out that 'international law does not impose an obligation on the home State to control the activities of corporations of its nationality abroad, not even when these activities are conducted directly, without any creation of a subsidiary company or by subcontracting'.[44] In 2010, De Schutter argued that an obligation should be imposed

[41] Jan Wouters & Cedric Ryngaert, *Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction* 40 THE GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 939(2009). p.947.
[42] United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, HR/PUB/11/04.
[43] Id.
[44] Olivier De Schutter, The Accountability of Multinationals for Human Rights Violations in European Law, CHRGJ Working Paper No. 1, 2004, p.11.

on the home States of multinational corporations to adopt parent-company-based extraterritorial regulation.[45] In 2015, De Schutter repeated a similar opinion on imposing human rights obligations on home States.[46] Previous research on home State obligations mainly adopts a due diligence approach and scholars try to prove that State due diligence obligations extend at least to regulating MNCs based in a home State for their extraterritorial human rights abuses.[47] Opponents follow a narrow interpretation of the scope of State obligations under human rights treaties. For example, O'Brien has argued that a home State does not have human rights obligations to regulate MNCs based in its territory for their conduct abroad because individual victims are generally not within the jurisdiction of a home State.[48] What is an appropriate interpretation of human rights treaties, a home State due diligence approach or the denial of home State obligation approach? Is it possible to reconcile both approaches? In addition, an extraterritorial obligations approach in human rights law has expanded and such an approach deals with State obligations towards individuals located in another country.[49] The debates on home State obligations should be further examined in light of the development of the extraterritorial obligations approach.

Previous research has not paid adequate attention to State-owned corporations, whose conduct may be directly attributed to a home State. For example, although Robert McCorquodale and Penelope Simons have discussed attribution issues, they did not fully consider State-owned corporations.[50] Unlike State-owned corporations, the conduct of an ordinary company generally cannot be directly attributed to a

[45] Olivier De Schutter, Sovereignty-plus in the Era of Interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations, CRIDHO Working Paper 2010/5, p.25.
[46] Olivier De Schutter, Towards a Legally Binding Instrument on Business and Human Rights, CRIDHO Working Paper 2015/2, p.21.
[47] Robert McCorquodale & Penelope Simons, *Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 MODERN LAW REVIEW 598(2007). p.618.
[48] Claire Methven O'Brien, The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Case of Extraterritorial Overreach?, DIHR Matters of Concern Human Rights Research Papers No.2016/04, p.23.
[49] See Chapter 3, Chapter 4.
[50] McCorquodale & Simons, supra note 47, pp.606-610.

home State. (See Chapter 2 of this book). Different attributions entail different types of State obligations. According to the current prevalent human rights law theory, a State has obligations to respect, to protect, and to fulfill human rights.[51] In this regard, a home State's obligations concerning its State-owned corporations may be different from its obligations for ordinary companies.

Nowadays, multinational corporations are no longer just based in western countries but they are increasingly based in some emerging economies such as China.[52] According to the statistics from China's Ministry of Commerce, the net amount of overseas investments in 2011 was 74.65 billion US dollars, and the figure in 2012 was 77.22 billion US dollars.[53] Previous studies of home State obligations mainly focused on the practice in European countries and there is little literature on China's practice as a home State of MNCs.[54] This book undertakes a case study of China's practice as a home State and examines how China has regulated Chinese investments abroad. In China, State-owned corporations are an important section of its economy. The interplay between the Chinese government and its State-owned corporations could further shed light on the need for a special rule on attribution issues concerning State-owned corporations, which is an argument provided in this book (See Chapter 2).

4. The Concepts of Home State Obligations and Territorial or Extraterritorial Obligations

This section deals with a conceptual problem in human rights debates, namely the relationship between the notion of home State obligations and the concept of

[51] WALTER KÄLIN & JÖRG KÜNZLI, THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION (Oxford University Press. 2009). p.96.
[52] United Nations Conference on Trade and Development, World Investment Report 2015: Reforming International Investment Governance, p.127.
[53] The data are available at: http://www.fdi.gov.cn/pub/FDI/wztj/jwtztj/t20130121_148636.htm http://www.fdi.gov.cn/pub/FDI/wztj/jwtztj/t20120904_145739.htm (last accessed 15-01-2013).
[54] Olivier De Schutter, The Accountability of Multinationals for Human Rights Violations in European Law, CHRGJ Working Paper No. 1, 2004.

territorial and extraterritorial obligations. According to the well-established notion, a State only has human rights obligations towards individuals within its jurisdiction.[55] Although the word 'jurisdiction' is not synonymous with territory, traditional doctrines rarely addressed the question of when State obligations could extend to the protection of individuals extraterritorially.[56] In the context of business and human rights, the persons influenced by multinational corporations are usually those living in the territory and under the jurisdiction of a host State. Does it mean that a home State does not have any obligation to regulate corporations based in its territory for the benefit of individuals in a host State? This issue is seemingly related to a newly developed doctrine, namely the extraterritorial obligations (ETOs) flowing from human rights.[57] According to the ETO approach, the scope of State obligations is not exclusively linked to individuals within its territory. As some scholars have argued in the Maastricht Principles (drafted as an expert opinion by academics around the world), States have obligations to respect, protect and fulfill human rights, including civil, cultural, economic, political, and social rights both within their territories and extraterritorially.[58] In current human rights debates, home State obligations are usually discussed under the concept of extraterritorial obligations to protect.[59]

This section explains, however, that the territorial obligation with extraterritorial effects should be differentiated from the extraterritorial obligations in the narrow

[55] See the preamble of the Universal Declaration of Human Rights.
[56] SIGRUN SKOGLY, BEYOND NATIONAL BORDERS: STATES' HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION (Intersentia. 2006). p.6. When scholars talk about the human rights of non-citizens, they usually refer to non-citizens located in the territory of a State, rather than non-citizens living abroad. See DAVID WEISSBRODT, THE HUMAN RIGHTS OF NON-CITIZENS (Oxford University Press. 2008). p.1.
[57] Rick Lawson, *Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights*, *in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno Kamminga eds., 2004). p.120. Hugh King, *The Extraterritorial Human Rights Obligations of States*, 9 HUMAN RIGHTS LAW REVIEW (2009). p.556. MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (Oxford University Press. 2011). p.209.
[58] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, available at: http://www.etoconsortium.org/en/library/maastricht-principles/ (last accessed 23-07-2014).
[59] Id, paras.23-24.

sense and that they should not be treated in the same way. In this regard, some constitutional law theories on human rights --especially the German notion of subjective rights and the objective order of values, and a recent Dutch case concerning State's duty of care -- shed light on the difference between two. This book will further reveal that home State obligations for State-owned corporations are extraterritorial obligations to respect.[60]

4.1. The Concept of Extraterritorial Obligations: A Response to the Challenge of Globalization

International human rights law, despite being entitled 'international', did not pay much attention to human rights violations beyond borders when it was first created after the Second World War. Although several human rights treaties prescribe State obligations towards individuals under its jurisdiction (rather than territory) and some even do not express limitations, the extraterritorial aspects of human rights treaties had not been fully explored until the 1990s.[61] For a long period of time, 'international' human rights law did not necessarily include 'transnational obligations'.[62] In the beginning, international human rights law was designed to monitor how a State treats its nationals.

In the era of economic globalization, however, the exercise of State power is increasingly having effects on individuals in the territory of another State. In human rights law, a question arises as to whether human rights treaties can be extraterritorially applied or whether a State has extraterritorial human rights obligations. For example, does targeted killing committed by a State abroad constitute a violation of the right to life in another country? Furthermore, in the area of economic, social and cultural rights, if a State imposes a food embargo sanction on another State, does the former State violate the right to food of individuals in the

[60] See Chapter 4, at 6.
[61] See Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AMERICAN SOCIETY OF INTERNATIONAL LAW 78(1995). pp.78-82.
[62] Sigrun Skogly & Mark Gibney, *Transnational Human Rights Obligations*, 24 HUMAN RIGHTS QUARTERLY 781(2002). p.782.

latter State?[63] Does human rights law require a State to provide food to individuals located in another State? Or do human rights impose an obligation on a State to eradicate global poverty? These issues are challenges we are facing today. The general research question of this book is formulated in a similar fashion: Does a home State have obligations under human rights treaties to regulate the human rights abuses of MNCs headquartered in that State committed in a host State?

In response to the challenge of economic globalization, scholars have put forward new approaches to the scope of State obligations on human rights. Some US constitutional law scholars have argued that the Bill of Rights in the US Constitution should apply beyond national borders in some situations to protect individuals abroad.[64] In international law, some authors have argued that a State has a 'transnational human rights obligation'.[65] Some other scholars have argued that a State has an 'extraterritorial human rights obligation'. [66] Despite different expressions employed, all of these approaches contend that the scope of State obligations extends extraterritorially in some cases.

On 28 September 2011, at a gathering convened by Maastricht University and the International Commission of Jurists, a group of experts in international law and human rights adopted the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (the Maastricht

[63] Dursun Peksen, *Better or Worse? The Effect of Economic Sanctions on Human Rights*, 46 JOURNAL OF PEACE RESEARCH 59(2009). p.74.
[64] Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology after Rasul V. Bush*, 153 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 2073(2005);Jean-Marc Piret, *Boumediene v. Bush and the Extraterritorial Reach of the U.S. Constitution: A Step towards Judicial Cosmopolitanism?*, 4 UTRECHT LAW REVIEW 81(2008);Galia Rivlin, *Constitutions beyond Borders: The Overlooked Practical Aspects of the Extraterritorial Question*, 30 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 135(2012).
[65] Skogly & Gibney, HUMAN RIGHTS QUARTERLY, (2002). p.798.
[66] MICHAL GONDEK, THE REACH OF HUMAN RIGHTS IN A GLOBALISING WORLD: EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Intersentia. 2009); Fons Coomans, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights*, 11 HUMAN RIGHTS LAW REVIEW 1(2011);Ralph Wilde, *Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties*, 12 CHINESE JOURNAL OF INTERNATIONAL LAW 639(2013).

Principles).[67] The Maastricht Principles have reflected the recent development on the ETO approach in the area of economic, social and cultural rights. Notwithstanding the title, the Maastricht Principles are not excluded from being applied in the area of civil and political rights.[68] Ever since the *Banković* case in 2001, academics have shown a great interest in the ETO approach in the area of civil and political rights.[69] As Chapter 3 will show, the European Court of Human Rights, the Human Rights Committee and the International Court of Justice have also contributed to the idea of ETO. Until now, the extraterritorial dimensions of negative obligations have encountered less resistance than positive obligations.[70] The concept of home State obligations in this book entails the territorial obligation with extraterritorial effects[71], the extraterritorial obligation to respect[72], and the extraterritorial obligation to protect[73].

4.2. The Conceptual Problem of the Maastricht Principles: Heuristics from Constitutional Law Theories on Human Rights

4.2.1. The Definition of ETO Based on the Location of the Individuals Affected

Under the Maastricht Principles, extraterritorial obligations are defined in accordance with the location of the individuals affected. In these Principles, one of the two kinds of extraterritorial obligations is defined as obligations relating to the

[67] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, available at: http://www.etoconsortium.org/en/library/maastricht-principles/ (last accessed 23-07-2014).
[68] Id, para.5.
[69] The European Court of Human Rights, Banković and Others v. Belgium and Others, Grand Chamber, Decision as to the Admissibility of Application, 12 December 2001.
[70] Fons Coomans, *Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights*, *in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno T. Kamminga eds., 2004).p.199.
[71] Chapter 4, at section 5.
[72] Chapter 4, at section 6.
[73] Chapter 4, at section 4.2.

acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights of individuals located outside of that State's territory.[74] It can be seen from the Maastricht Principles that whether an obligation is territorial or extraterritorial depends on whether the individuals affected are territorial or extraterritorial in relation to the State concerned.

The Maastricht Principles employ the tripartite typology of State obligations as an analytical tool to elaborate on extraterritorial obligations. The idea of the tripartite typology is that every human right imposes three different types of obligation on States: the obligation to respect, to protect and to fulfill.[75] The obligation to respect requires States to refrain from interfering with the enjoyment of human rights.[76] The obligation to protect requires States to prevent violations of human rights by third parties.[77] The obligation to fulfill requires States to take appropriate legislative, administrative, budgetary, judicial, and other measures towards the full realization of human rights.[78] Under the Maastricht Principles, States have extraterritorial obligations to respect, to protect and to fulfill human rights.

The Maastricht Principles discuss home State obligations under the concept of extraterritorial obligations to protect.[79] The Maastricht Principles are active in promoting the notion of home States obligations to regulate business, but their strategy (discussing it under the concept of extraterritorial obligations to protect) may create a conceptual confusion. Home State obligations are not necessarily 'extraterritorial' obligations, but they could be simply 'territorial' obligations. It is

[74] Id, para.8. The other kind of extraterritorial obligations are obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.
[75] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, available at: http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/TextsAdoptedByTheCentre.htm (last accessed 10-06-2014), para.6.
[76] Id.
[77] Id.
[78] Id.
[79] Id, para.25. Olivier De Schutter, et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, 34 HUMAN RIGHTS QUARTERLY 1084(2012). pp.1135-1137.

possible that States do not have extraterritorial obligations to protect, but they still have territorial obligations to regulate multinational corporations based in their territory.

The Maastricht Principles have in fact conflated two different situations under the concept of ETO: the extraterritorial obligations in the narrow sense and territorial obligations with extraterritorial effects. The former refers to a situation where an individual abroad has an entitlement (subjective right) towards a State. The latter requires a State to take measures within its own territory for the benefit of individuals abroad, whereas those individuals may not have such an entitlement. Those two situations should be distinguished because they could be based on different notions: human rights as subjective rights and human rights as an objective order of values.[80] For example, States may not have 'extraterritorial' obligations to protect (in the sense of subjective rights), but they still have 'territorial' obligations to regulate (in the sense of human rights as an objective order of values) multinational corporations located in their territory with regard to corporate behaviors abroad. For the latter case, this book would call it territorial obligations, because these obligations do not correspond to an entitlement of individuals abroad. The next section will explain the difference in detail by reference to the mainstream German theory on basic rights.

4.2.2. Human Rights as Subjective Rights and an Objective Order of Values

According to the mainstream German theory on basic rights, human rights (basic rights) serve various purposes.[81] Depending on the different purposes, human rights could function as either subjective rights or an objective order of values (*Grundrechte als objektive Wertordnung*).[82] For human rights as subjective rights,

[80] LORNA WOODS & SABINE MICHALOWSKI, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES (Ashgate. 1999). pp.73-77.
[81] Id, p.75.
[82] 张翔:《基本权利的双重属性》,《法学研究》2005 年第 3 期,pp.24-25. (Xiang Zhang, The Dual Functions of the Fundamental Rights, Legal Research, no.3, 2015, pp.24-25.)

the right-holders and the duty-bearers are interrelated. In this situation, a State has obligations towards individuals and the individuals have a claim on the State. For human rights as the objective order of values, a State has obligations but no individual has a claim on the State. In the latter situation, State obligations are duties of care in essence.

4.2.2.1. Human Rights as Subjective Rights

In Alexy's book on the theory of German constitutional rights, subjective rights are understood as forming a three-point relationship, of which the first element is the beneficiary or holder of a right, the second is the addressee of the right, and the third is the subject matter or object of the right.[83] The key point of subjective rights is their relational character.[84] The following two formulae are equal in the context of subjective rights.

(a) *x* has a right against *y* that *y* help him

(b) *y* is obligated to *x* to help him

According to Alexy, formula (a) is equal to formula (b) which expresses a relational obligation.[85]

4.2.2.2. Human Rights as the Objective Order of Values

Human rights could also function as objective norms (the objective order of values) that require a State to protect individuals without giving those individuals entitlements or claims.[86] The function of human rights as the objective order of values is complementary to, and does not substitute, the function of human rights as subjective rights. The objective order of values indicates a non-relational obligation

[83] ROBERT ALEXY & JULIAN RIVERS, A THEORY OF CONSTITUTIONAL RIGHTS (Oxford University Press, USA. 2009). p.120.
[84] Id, p.131.
[85] Id.
[86] Id, p.301.

which could be expressed by the following formula (compared to formula (a) and formula (b)).

(c) *y* is obligated to help *x*.

According to Alexy, the existence of this duty does not mean that x has a right to help from y.[87] It could be that nobody, or that some third party, has the right.[88]

The legal basis for the objective order of values is Article 1(3) of the German Basic Law, which provides that: 'The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.'[89] It is submitted that a similar clause can be inferred from or read into human rights treaties. For example, Article 2(2) of the ICCPR arguably creates an objective norm which binds the legislature of a State. From Article 6 to Article 15 of the ICESCR, States 'recognize' a series of rights for everyone. The term 'recognize' indicates that those rights at least bind State parties like an objective norm.

4.2.2.3. The Division between Subjective Rights and the Objective Order of Values

Subjective rights tie human rights to individuals, whereas the objective function of human rights limits a State's leeway in that every State action has to take care of human rights, irrespective of whether there is a particular plaintiff to bring an action for the infringement of a human right.[90]

The demarcation between subjective rights and the objective order of values, however, is not clear-cut. Rights to negative acts are no doubt considered as subjective rights. But there are some debates on the nature of some positive

[87] Id, p.131.
[88] Id.
[89] Basic Law for the Federal Republic of Germany, Translators: Professor Christian Tomuschat, Professor David P. Currie, and Professor Donald P. Kommers in cooperation with the Language Service of the German Bundestag, available at: https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf (last accessed 2015-01-08).
[90] WOODS & MICHALOWSKI, supra note 80, p.77.

obligations, namely whether they correspond to subjective rights or purely to the objective order of values. State's positive obligations include the protective obligations (Schutzpflicht), the obligations of organization and procedure (Einrichtungsgarantie), and performance obligations in the narrow sense (Leistungspflicht).[91] The former two types of positive obligations have an intersecting area because the protective obligations may also demand a State to provide certain legal regimes. The performance obligations in the narrow sense, for example the obligation to provide free compulsory education, are usually considered subjective rights and there are few debates on this point. The debates mainly focus on the nature of the former two types of positive obligations. Some scholars consider the protective obligations and the obligations of organization and procedure as purely corresponding to the objective order of values, as are indicated by most cases of the German Federal Constitutional Court.[92] By contrast, Alexy argued strongly for the subjectification of the protective obligations and the obligations of organization and procedure.[93] Regardless of how the debates are proceeding, it is enough to state here that human rights could function as both subjective rights and the objective order of values.

4.2.3. What We Can Learn from Constitutional Law Theories

Although the idea of human rights as the objective order of values originated in Germany, the jurisprudence is almost universally applicable. The texts of constitutions from different countries support the idea of the objective order of values. For example, Chapter One of the Dutch Constitution, which provides for fundamental rights, consists of 23 articles.[94] Among them, the first 18 articles are

[91] ALEXY & RIVERS, supra note 83, pp.294-296.
[92] WOODS & MICHALOWSKI, supra note 80, p.77. 谢立斌:《自由权的保护义务》,《比较法研究》2011 年第 1 期,第 40 页. (Libin Xie, The Protective Obligations for the Liberal Rights, Journal of Comparative Law, vol.24 (1), 2011, p.40.)
[93] ALEXY & RIVERS, supra note 83, p.296, p.302, p.318.
[94] The Constitution of the Kingdom of the Netherlands 2008, published by the Ministry of the Interior and Kingdom Relations, Constitutional Affairs and Legislation Division in collaboration with the Translation Department of the Ministry of Foreign Affairs, available at:

written with the language of 'everyone shall have the right to', which indicate subjective rights, while the other five articles are mainly written with the language of 'it shall be the concern of the authorities to', which only indicates the objective order of values.[95] For another example, Part Three of the Indian Constitution is entitled 'fundamental rights', which is followed by Part Four entitled 'directive principles of State policy'.[96] The provisions of Part Four 'shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws'.[97] In the Chinese Constitution, we can find a similar provision to Article 1(3) of the German Basic Law. According to Article 5(4) of the Chinese Constitution, 'all State organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and other laws'.[98] Now that provisions on fundamental rights are a part of the Chinese Constitution, all governmental organs should abide by those provisions when they formulate governmental policies.

There are two variations of the idea of human rights as subjective rights and the objective order of values: the German edition and the Indian or Dutch edition. The German Basic Law only provides for civil and political rights which are originally considered as subjective rights. German scholars have supplemented the function of those provisions by considering them as the objective order of values. According to traditional German theory, human rights, as subjective rights, only entail negative obligations and the obligations of performance (for example to provide medical care) in the narrow sense. By introducing the idea of the objective order of values, human rights also entail the protective obligations, namely to prevent interference

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http://www.government.nl/documents-and-publications/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008.html (last accessed 2015-12-08).

[95] Id.

[96] The Constitution of India, available at: http://lawmin.nic.in/coi/coiason29july08.pdf (last accessed 2015-12-08).

[97] Id, Article 37.

[98] The Constitution of the People's Republic of China, amended in 2004, available at: http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm (last accessed 2015-12-08), Article 5(4).

by private actors. On the contrary, in the Indian and the Dutch Constitution, some provisions on economic, social and cultural rights (for example Part Four of the Indian Constitution) are only treated as the objective order of values and they do not correspond to subjective rights. However, one can never say that all economic, social and cultural rights are purely the objective order of values.[99] For example, Article 23 of the Dutch Constitution concerns the right to education. Article 23(1) uses the following language: 'Education shall be the constant concern of the Government', which indicates the objective order of values (also Article 23(3)-(8)). Article 23(2) states: 'All persons shall be free to provide education', which confers subjective rights on individuals.

By reference to comparative law materials, it can be seen that human rights as subjective rights naturally give rise to the objective order of values, not the other way around. It means that some provisions in a constitution or treaty only serve as the objective order of values, whereas those provisions conferring subjective rights simultaneously serve as the objective order of values. With regard to human rights treaties, Article 2(1) and Article 2(3) of the International Covenant on Civil and Political Rights (the ICCPR) clearly confer subjective rights upon individuals in a general sense, whereas Article 2 of the International Covenant on Economic, Social and Cultural Rights (the ICESCR) does not explicitly pronounce subjective rights in a general sense. As is shown in Chapter 4, however, it does not mean that the ICESCR does not contain any subjective rights.

The objective order of values signifies that human rights provisions impose some obligations on States even though there is no individual entitlement. This phenomenon is also referred to as a State's duty of care or State's due diligence obligation. In a recent Dutch case -- *Urgenda v. the State of the Netherlands* case,

[99] Mirja Trilsch, Die Justiziabilität wirtschaftlicher, sozialer und kultureller Rechte im innerstaatlichen Recht (The justiciability of economic, social and cultural rights in domestic law), Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol. 34, Heidelberg: Springer, 2012. p.511. English Summary, available at: http://www.mpil.de/files/pdf1/beitr234.pdf (last accessed 27-11-2015).

the Hague District Court clarified the significance of a State's duty of care.[100] Among others, Urgenda (an environmental NGO) requests the court to rule that: 'the State acts unlawfully if it fails to reduce or have reduced the annual greenhouse gas emissions in the Netherlands by 40%, in any case at least 25%, compared to 1990, by the end of 2020; alternatively: the State acts unlawfully if it fails to reduce or have reduced the annual greenhouse gas emissions in the Netherlands by at least 40% compared to 1990, by the end of 2030.'[101] Urgenda has argued that Article 21 of the Dutch Constitution, the international law 'no harm' principle, the UN Climate Change Convention and the Treaty on the Functioning of the European Union (TFEU) have imposed a duty of care on the State.[102] The court found that:

'--Article 21 of the Dutch Constitution imposes a duty of care on the State relating to the live-ability of the country and the protection and improvement of the living environment.

-- [A] legal obligation of the State towards Urgenda cannot be derived from Article 21 of the Dutch Constitution, the 'no harm' principle, the UN Climate Change Convention, with associated protocols, and Article 191 of the TFEU with the ETS Directive and Effort Sharing Decision based on TFEU. Although Urgenda cannot directly derive rights from these rules and Articles 2 and 8 ECHR, these regulations still hold meaning, namely in the question discussed below whether the State has failed to meet its duty of care towards Urgenda.'[103]

The Urgenda case has highlighted the significance of the duty of care or the objective order of values. It indicates, for the purpose of this book, that even if the individual victims of corporate abuses may not explicitly derive any entitlement

[100] The Hague District Court, the Urgenda v. the State of the Netherlands, Judgement of 24-6-2015. The English translation is available at: http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196 (last accessed 7-10-2016).
[101] Id, para.3.1.
[102] Id, para.3.2. Article 21 of the Dutch Constitution provides that: 'It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.'
[103] Id, para.4.36, para.4.52.

from a home State, the latter may still have obligations to regulate corporations in their territory. Such obligations are State's due diligence obligations in essence.[104] This book would refer to these obligations as territorial obligations because, in the context of the objective order of values, what really matters is not the individual victims but that the perpetrators are regulated, which is clearly a territorial issue in relation to a home State.[105] In the context of transnational investments, the MNC usually sets up subsidiaries in a host State. Generally speaking, a home State is only required to regulate parent companies which are registered or domiciled or have their main place of business in its territory rather than those subsidiaries. The obligation of a home State to regulate an MNC (usually a parent company of an MNC) in their territory is essentially a territorial obligation which has extraterritorial effects.

Recent human rights monitoring practice indicates that State obligations to regulate private actors are triggered if a perpetrator is within its territory. In 2015, the African Commission on Human and Peoples' Rights published its General Comment No. 3 on the right to life. In this general comment, the African Commission stated that: 'A State shall respect the right to life of individuals outside its territory. A State also has certain obligations to protect the right to life of such individuals. The nature of these obligations depends for instance on the extent that the State has jurisdiction or otherwise exercises effective authority, power, or control over either the perpetrator or the victim (or the victim's rights), or exercises effective control over the territory on which the victim's rights are affected, or whether the State engages in conduct which could reasonably be foreseen to result in an unlawful deprivation of life.'[106] The African Commission has further pointed out that: 'Home States also should ensure accountability for any extraterritorial violations of the right to life, including those committed or contributed to by their

[104] JOANNA KULESZA, DUE DILIGENCE IN INTERNATIONAL LAW (Brill | Nijhoff. 2016).p.2.
[105] Elif Askin, Due Diligence Obligation in Times of Crisis: A Reflection by the Example of International Arms Transfers, EJIL: Talk! (1 March 2017).
[106] The African Commission on Human and Peoples' Rights, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life, 2015, para.14.

nationals or by businesses domiciled in their territory or jurisdiction.'[107] Therefore, whether the individuals affected are within the territory or jurisdiction of a State is not a determinative factor of State obligation. A perpetrator's location within the territory of a State is sufficient to trigger State's obligation to regulate. In other words, States have 'territorial' obligations to regulate a potential perpetrator within its territory. It should be noted that this does not refer to secondary rules for State responsibility. What the African Commission has discussed is the threshold for State human rights obligations (primary rules) rather than criteria for attribution issues under secondary rules.

4.2.4. The Conceptual Problem of the Maastricht Principles

The Maastricht Principles discuss home State obligations under the concept of the extraterritorial obligation to protect. It may cause two misunderstandings: first, to require a home State to take protective measures in the territory of a host State; second, to generously give an entitlement to individuals located in a host State in relation to a home State whereas human rights treaties may not say so. For the first point, a State is generally not allowed to take actions in another State without the consent of the latter. For the second point, international law jurisprudence has not been fully developed to justify an entitlement of individuals for protection of their rights towards a State other than the State of their nationality or the one which they are physically in. The notion of Responsibility to Protect (R2P) may be seen as a new development but, despite its moral significance, the legal status of such a notion raises debates.[108] The Maastricht Principles have not fully justified such an entitlement and the meaning of jurisdiction under the Maastricht Principles is so broad that it may indicate that if a State is capable to protect a person then it has an obligation to do so. This book proposes a different justification for extraterritorial

[107] Id, para.18.
[108] Halil Rahman Basaran, *Responsibility to Protect: An Explanation*, 36 HOUSTON JOURNAL OF INTERNATIONAL LAW 581(2014). p.583. Ramesh Thakur & Thomas G. Weiss, *R2P: From Idea to Norm—and Action?*, 1 GLOBAL RESPONSIBILITY TO PROTECT 22(2009). p.52.

obligations to protect by adopting a narrower interpretation of jurisdiction (but wider than the ECtHR case law) under human rights treaties. (See Chapter 4)

5. Methodology and Outline of the Book

5.1. The Main Purpose of this Book

This book undertakes mainly normative research on the scope of State obligations under human rights treaties. In doing so, this book compares the language concerning general obligations of States in different treaties. Some human rights treaties such as the ECHR and the ICCPR contain a jurisdiction clause (or territory and jurisdiction clause) which indicates whose rights a State shall enforce. Other human rights treaties such as the ICESCR do not contain such a clause. The ECtHR and some scholars have been engaged in the interpretation of the term 'jurisdiction'.[109] This book briefly introduces those interpretations (Chapter 3) but it does not necessarily hinge on the interpretation of the term 'jurisdiction' in developing a home State obligation approach. On the one hand, the present-day conditions of the international society arguably add new meanings to the term 'jurisdiction' in human rights treaties. On the other hand, or alternatively, this book contributes to the understanding of the function and meaning of the holistic jurisdiction clause. It argues that, even if a person is not within the jurisdiction of a home State, the State may still have obligations to prevent MNCs which are registered or domiciled or have main their place of business in it from impairing his rights (a due diligence approach). This book arrives at such a conclusion by means of the treaty interpretation method.

This book pays special attention to State-owned corporations. The UN Working Group on the Issue of Human Rights and Transnational Corporations and Other

[109] The European Court of Human Rights, Al-Skeini and Others v. the United Kingdom, Grand Chamber, Judgment, 7 July 2011, paras.130-150. Erik Roxstrom, et al., *The NATO Bombing case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights protection*, 23 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 55(2005). pp.135-136.

Business Enterprises has also realized the adverse human rights impacts of State-owned corporations, but it mainly deals with such a problem in the context of State duty to protect human rights.[110] The attribution issue concerning State-owned corporations has not been fully researched in the field of human rights law. The exploration of expanding State responsibility in relation to human rights abuses by corporations could also be achieved by attributing to States a greater share of such abuses.[111] If a direct attribution of corporate abuses can be proven, a home State's obligation to respect human rights is at issue.[112] For the above reasons, this book explores whether the conduct of a State-owned corporation could be directly attributed to the State as owner. In this regard, general rules on attribution which have been addressed by the ICJ, the ICTY and WTO are of little help.[113] The author of this book aims to propose a special rule on the attribution issue for State-owned corporations in the field of human rights issues.

5.2. Treaty Interpretation

This book arrives at a conclusion mainly by interpreting the ICCPR and the ICESCR in accordance with the customary law method of treaty interpretation. This book acknowledges the idea that all human rights are indivisible, interdependent and interrelated.[114] The scope of State obligations under the ICCPR or the ICESCR is discussed in different chapters due to different language concerning the general obligations in respective treaty. After analyzing the scope of State obligations under

[110] UN Human Rights Council, Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 4 May 2016, A/HRC/32/45, para.22.
[111] Monica Hakimi, *State Bystander Responsibility*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 341(2010).p.348.
[112] Id, p.354. The obligation to respect is more onerous than the obligation to protect.
[113] It will be discussed in the next chapter.
[114] Craig Scott, *Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 OSGOODE HALL LAW JOURNAL 769(1989).p.771. Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para.5.

the ICCPR and the ICESCR, this book will put forward a unified approach to the scope of State obligations in regards to all human rights treaties.[115]

The rules on treaty interpretation expressed in the 1969 Vienna Convention on the Law of Treaties (VCLT) have been regarded by States and the International Court of Justice as reflecting customary international law.[116] These rules therefore can be applied to the interpretation of the treaties that were concluded before the VCLT entered into force or that are concluded among States other than the State parties to the VCLT. The ICCPR and the ICESCR were concluded in 1966, before the entry into force of the VCLT in 1980. The elements contained in Article 31 and Article 32 of the VCLT remain applicable to the interpretation of the ICCPR and the ICESCR in the sense that they reflect pre-existing customary international law.

There could be some debates, especially in cases of the European Court of Human Rights, on whether the special nature of human rights treaties requires special rules of interpretation that differ from Article 31 and Article 32 of the VCLT.[117] However, the rules in the VCLT are already flexible enough.[118] Research shows that the principles for the interpretation of human rights treaties that have been relied upon by main judicial bodies do not differ substantially from the methods of treaty interpretation that are available under general international law.[119] Furthermore, some scholars who emphasize the special nature of human rights treaties also support the application of the rules on interpretation under the VCLT in

[115] Positive obligations under Article 2(1) of the ICCPR are an exception because of the unique language.
[116] The ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, para.94; The ICJ, Case concerning Legality of Use of Force, Serbia and Montenegro v. Belgium, Preliminary Objections, Judgment of 15 December 2004, para.100.
[117] The European Court of Human Rights, Soering v. United Kingdom, judgment of 7 July 1989, para.87.
[118] Başak Çali, *Specialized Rules of Treaty Interpretation: Human Rights*, *in* THE OXFORD GUIDE TO TREATIES (Duncan B. Hollis ed. 2012). p.526.
[119] The International Law Association, Final Report on the Impact of International Human Rights Law on General International Law, Rio de Janeiro Conference (2008).

consideration of legal certainty.[120] Therefore, Article 31 and Article 32 of the VCLT provide a framework for interpreting human rights treaties and will be used in the present study.

Article 31 is entitled 'general rule', in the singular, which indicates that all elements contained in this article should be considered in the single process of application. No one particular means or element mentioned in Article 31 dominates the others.[121] The means or elements of Article 31 include 'good faith', 'the ordinary meaning of a term', 'the context', 'a treaty's object and purpose', 'subsequent agreement between the parties regarding the interpretation', 'subsequent practice', 'relevant rules of international law'. According to Article 32, other elements such as the preparatory work of a treaty can be only used as a supplementary means of interpretation. This book adopts an approach that elements in Article 31 and Article 32 of the VCLT are flexible enough for interpreting human rights treaties. The special nature of human rights treaties may alter the content of a certain element of Article 31, for example 'subsequent practice', which will be discussed in Chapter 5. But Article 31 and Article 32 of the VCLT are generally applicable to human rights treaties.

This book takes the approach that human rights treaties, whether regional or universal, are a 'living instrument', which should be interpreted according to present-day conditions.[122] Although the notion of living instrument has mainly been discussed in the context of European Convention on Human Rights,[123] the rationale

[120] John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARVARD HUMAN RIGHTS JOURNAL (2010). p.49.
[121] Mark E. Villiger, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The 'Crucible' Intended by the International Law Commission*, *in* THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION (Enzo Cannizzaro ed. 2011).
[122] George Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 509(2010).p.527.
[123] HANNEKE SENDEN, INTERPRETATION OF FUNDAMENTAL RIGHTS IN A MULTILEVEL LEGAL SYSTEM (Intersentia. 2011).p.70.

behind it is arguably applicable to all human rights treaties.[124] Against this background, this book adopts a dynamic interpretation of the term 'jurisdiction' in human rights law, thinking of it in our time marked by expansion of transnational investments.

International investment law has a close link to the issue of business and human rights and therefore this book aims to establish a connection between human rights law and investment law when interpreting 'jurisdiction' in human rights law. It interprets jurisdiction with due regard to international investment law. This could make sub-regimes of international law systematically harmonious.[125] In parallel with the interpretation of the term 'jurisdiction', a home State due diligence obligation could be derived from the interpretation of the function and meaning of the holistic jurisdiction clause by synthetically considering 'subsequent practice' and 'relevant rules of international law' (See Chapter 4). In any case, this book interprets a treaty term in good faith in order not to make it meaningless.

5.3. Method on Specific Issues

5.3.1. Attribution Issues

This book adopts the framework provided by the ILC Articles on State responsibility as a starting point to discuss attribution issues.[126] The ILC Articles have provided three situations where an action or omission is directly attributed to a State. These situations are 'conduct of organs of a State', 'conduct of persons or entities exercising elements of governmental authority', and 'conduct directed or controlled by a State'. These situations are quite abstract and therefore they need to

[124] Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 529(2003).p.532.
[125] Erika De Wet & Jure Vidmar, *Conflicts between International Paradigms: Hierarchy versus Systemic Integration*, 2 GLOBAL CONSTITUTIONALISM 196(2013).p.216.
[126] The International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, in the Yearbook of the International Law Commission, 2001, vol. II, Part Two. The articles are not adopted in the form of a treaty, but these articles are quite authoritative and they have been frequently invoked by international tribunals.

be further clarified. When scholars talk about attribution issues, a reference is often made to the ICJ *Nicaragua* case and the ICTY *Tadić* case.[127] This book looks beyond *Nicaragua* and *Tadić*, and it argues for a special rule on the attribution issue concerning State-owned corporations in light of the ECtHR and WTO case law. If a corporate conduct cannot be directly attributed to a home State, the non-regulation or inadequate regulation over an MNC is logically attributed to a State organ of the home State when it does not take proper measures to do so.

5.3.2. State Positive Obligations with Extraterritorial Elements

The idea of positive obligations has been widely accepted in human rights law.[128] Scholars have put forward a tripartite typology, namely the obligations to respect, to protect, and to fulfill, to analyze State obligations in the area of economic, social and cultural rights.[129] The Committee on Economic, Social and Cultural Rights has also adopted the tripartite typology in its general comments and concluding observations.[130] The tripartite typology has gradually expanded to the field of civil and political rights and some scholars use it to analyze all human rights obligations.[131] For the convenience of academic discourse, this book also uses the tripartite typology as an analytical tool. The following questions are important for the issue of home State obligations: What is the scope of State positive obligations?

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[127] McCorquodale & Simons, MODERN LAW REVIEW, (2007). pp.608-609. Danwood Mzikenge Chirwa, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights*, 5 MELBOURNE JOURNAL OF INTERNATIONAL LAW 1(2004). pp.4-5.

[128] LAURENS LAVRYSEN, HUMAN RIGHTS IN A POSITIVE STATE: RETHINKING THE RELATIONSHIP BETWEEN POSITIVE AND NEGATIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Intersentia. 2016).p.343. Danai Angeli, Positive Obligations in Human Rights Law: The Disabilities Paradigm Shift, doctoral dissertation, the European University Institute, 2015, p.296.

[129] OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS, COMMENTARY (Cambridge University Press 2 ed. 2014). p.280. Cees Flinterman, et al., *Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 Human Rights Quarterly 705 (1998). p.713.

[130] M. MAGDALENA SEPÚLVEDA, THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Intersentia. 2003). pp.196-246.

[131] Ida Elisabeth Koch, *Dichotomies, Trichotomies or Waves of Duties?*, 5 HUMAN RIGHTS LAW REVIEW 81(2005). p.95.

Do they require a State to take positive actions in another State? Do they at least require a State to control activities from its territory for the benefit of people living in another country? O'Brien has denied home State obligations for ordinary companies on the ground that individual victims are generally not within the jurisdiction of a home State.[132] This book challenges O'Brien's opinion by exploring new elements of jurisdiction under human rights treaties in face of economic globalization on the one hand and by emphasizing a territorial obligation with extraterritorial effects (due diligence) on the other hand. As this topic has already been fully explored in the context of the European Convention on Human Rights,[133] this book mainly focuses on UN human rights treaties especially the ICCPR and the ICESCR.

This book interprets the scope of State obligations according to the customary law method on treaty interpretation and by analogy to the German theory on subjective rights and the objective order of values. State due diligence obligation can be interpreted by reference to the object and purpose of a treaty, relevant rules of international law and subsequent practice. Furthermore, the term 'jurisdiction' in human rights law should be interpreted in light of relevant rules of international law (especially international investment law) in addition to its ordinary meaning. The German theory on subjective rights and the objective order of values could also give us some inspiration.[134]

Although the notion of subjective rights or the objective order of values comes from constitutional law theory, it could find echoes in international human rights law. If we understand international law strictly as laws among States, individuals are just beneficiaries of international protection rather than enjoying an entitlement.[135] But

[132] Claire Methven O'Brien, The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Case of Extraterritorial Overreach?, DIHR Matters of Concern Human Rights Research Papers No.2016/04, p.23.
[133] Dalia Palombo, Business and Human Rights: the Obligation of the European Home State, doctoral dissertation, Maastricht University, 2017, p.315.
[134] The above section 4.2.2.
[135] PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW (Routledge 7 ed. 1997). p.100.

nowadays our human society generally admits that individuals are right holders in relation to a human rights treaty. We can say that it is a process of turning the objective order of values into subjective rights. Another example is economic and social rights. At first, the ICESCR was just considered to have codified State aims rather than real rights, but now it is generally recognized by international society (except a small group of countries including the US) as a treaty conferring rights on individuals.[136] If we think of State due diligence or protective obligations under human rights treaties from the perspective of the objective order of values, its scope is not necessarily limited by the jurisdiction clause in Article 2(1) of the ICCPR, which indicates the scope of right holders and entitlement. This approach has been endorsed by human rights treaty bodies (See Chapter 5). Home State obligations on such a basis may not be directly invoked by individuals, but they can at least be invoked by other State parties to a treaty. We should also notice that the objective order of values can turn into a subjective right. The Dutch *Urgenda* case indicates that, if sources from outside could help to define the content of State obligations, then a subjective right could be derived from the objective order of values in conjunction with those external sources. (See the section above). We could argue that the 'no harm' principle in international law and treaty bodies' practice serve as external sources to define the content of home State obligations.

5.3.3. China's Practice as a Home State

After the theoretical framework, this book examines how China has fulfilled its obligations as a home State under human rights treaties. As a communist country with elements of capitalism by liberalizing its economy, China's economic power has been increasing rapidly in recent decades.[137] China has accumulated huge overseas investments and many of them have been made by China's State-owned corporations. However, China's practice as a home State has not been fully

[136] Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK (Asbjørn Eide, et al. eds., 2001). p.9.
[137] Surya P. Subedi, *China's Approach to Human Rights and the UN Human Rights Agenda*, 14 CHINESE JOURNAL OF INTERNATIONAL LAW 437(2015).p.438.

explored, as previous research has mainly focused on developed home States. An investigation of China's practice may also enrich the normative aspect of home State obligations. With this background, Chapter 6 researches China's attitude towards home State obligations in human rights law and how China has regulated Chinese overseas investments. China's attitude can be found in its official statements on the international stage and especially can be inferred from its second and third National Human Rights Action Plans.[138] For regulatory measures, Chapter 6 examines China's civil procedure law, legal assistance regime, China's policy on human rights NGOs, administrative regulations on overseas investments by the Ministry of Commerce, China's company law, China's tort law, private international law, and China's regulations on its State-owned corporations. Due to the limitation in the feasible scope, this book only examines China's legislation and administrative regulations, and it does not do empirical research on individual levels.

China's legislative and regulatory documents are available from the database of 'pkulaw.cn' (北大法宝).[139] The keywords used for searching the title or content of legal documents include: '境外' (extraterritorial), '跨境' (transboundary), '对外' or '海外' (overseas), '投资' (investment), '跨国公司' (multinational corporation or transnational corporation), '国有企业' (State-owned enterprise or corporation), '人权' (human right), '环境' (environment), '社会责任' (social responsibility). In order to avoid missing any important legal document, this book also checks regulatory documents on the official website of the Ministry of Commerce and the State-owned Assets Supervision and Administration Commission of the State Council one by one by hand. In addition to text analysis of relevant legal documents, this book also makes reference to Chinese scholarly writings as a source for understanding Chinese domestic law. Governmental information published on the website of relevant governmental bodies is another source of information for this book.

[138] China, National Human Rights Action Plan of China (2016-2020). China, National Human Rights Action Plan of China (2012-2015).
[139] The database is available at: http://www.pkulaw.cn/ (last accessed 10-06-2015).

5.4. Outline of the Book

Chapter 2 deals with attribution issues in international law. It specially answers the question of whether and how the conduct of State-owned corporations can be attributed to the owning State. After critically reviewing the ICJ *Nicaragua* case and the ICTY *Tadić* case, and in light of the ECtHR and WTO case law, this chapter proposes a special rule on the attribution issue concerning State-owned corporations in the field of human rights law.

Chapter 3 and Chapter 4 explore the scope of State obligations respectively in the field of civil and political rights and in the field of economic, social and cultural rights. Based on existing case law and scholarly writings, this book pushes the current debates forward by depicting the scope of different types of State obligations.

Chapter 5 examines whether and how home State obligations are interpreted by human rights treaty bodies. This chapter focuses on the general comments/recommendations and concluding observations of five representative committees, namely the Human Rights Committee (the HRC), the Committee on Economic, Social and Cultural Rights (the CESCR), the Committee on the Elimination of Racial Discrimination (the CERD), the Committee on the Elimination of Discrimination against Women (the CEDAW), and the Committee on the Rights of the Child (the CRC). It also explores whether general comments and concluding observations of treaty bodies could become subsequent practice under the meaning of Article 31 of the VCLT.

Chapter 6 researches China's attitude towards home State obligations in human rights law and how China has regulated Chinese overseas investments.

Chapter 7 provides the conclusion of the book. It will provide answers to the research questions.

Chapter 2 Attribution Issues under General International Law on State Responsibility

1. Introduction

This chapter answers the following questions: When a multinational corporation (MNC) abuses human rights in a host State, which act can be attributed to the home State of the MNC? In which circumstances could corporate conduct, for example the conduct of a State-owned corporation, be attributed entirely to the State concerned? If corporate conduct is not directly attributable to a home State, what act can be attributed to the home State? The attribution issue is important because it determines which obligations of a home State are at issue in a given situation.

The International Law Commission's 'Articles on Responsibility of States for Internationally Wrongful Acts' (the ILC Articles) provide a framework for the discussion of the attribution issue concerning State responsibility.[140] According to the ILC Articles, a State could be responsible for an action or omission. This chapter first reveals that the distinction between action and omission is not a good tool for analyzing attribution issues when private actors are involved. Instead, it proposes a distinction between a direct attribution and an indirect attribution based on the idea that the attribution issues should not be understood in isolation from primary obligations.[141] A direct or indirect attribution entails different human rights obligations when we discuss human rights violations. A direct attribution is closely linked to negative human rights obligation (the obligation to respect human rights). An indirect attribution concerns State positive obligation.

It is possible that corporate conduct which causes an abuse can be directly attributed to a home State. According to the ILC Articles, there are three legal bases

[140] International Law Commission, Responsibility of States for Internationally Wrongful Acts, in Yearbook of the International Law Commission, 2001, vol. II (Part Two).
[141] IAN BROWNLIE, STATE RESPONSIBILITY: PART I (Oxford University Press. 1983). p.161. State obligations under human rights treaties will be discussed in subsequent chapters.

on which corporate conduct may be attributable to the State concerned: conduct of organs of a State (Article 4), conduct of persons or entities exercising elements of governmental authority (Article 5), and conduct directed or controlled by a State (Article 8). This chapter explores whether corporate conduct that abuses human rights abroad can be directly attributed to its home State based on these three points. To clarify the meaning of 'control' under Article 8 of the ILC Articles, scholars tend to make reference to the *Nicaragua* case and the *Genocide* case of the ICJ and the *Tadić* case of the ICTY. In these cases, judges had the opportunity to elaborate on the meaning of control and they have put forward the 'effective control' standard and the 'overall control' standard respectively. Have they provided a clear criterion for control? Can the jurisprudence in those cases meet the challenge posed by economic globalization? This chapter will review these judgments critically and point out that their jurisprudence is inappropriate for the attribution issue concerning State-owned corporations. Instead, the European Court of Human Rights (ECtHR) has attempted to fill in that gap and the ECtHR's criterion is more appropriate for State-owned corporations than the effective control and overall control criteria. However, the ECtHR's criterion lacks objectivity and it subjects the question to judicial discretion. A WTO case (*the United States – Definitive Antidumping and Countervailing Duties on Certain Products from China*) specifically deals with attribution issues concerning State-owned corporations and it further indicates that the challenge of the attribution issue is rooted in the weakness of the discovery mechanism (evidence finding procedure) in international society. We can learn from the ECtHR and WTO case law that a special rule of attribution is needed. China's practice concerning State-owned corporations further exemplifies the urgent need for the special rule of attribution.

2. General Rules on Attribution

2.1. The Current Legal Framework on State Responsibility

Attribution is an important part of the law of State responsibility. The topic of State responsibility has been discussed extensively. As early as the 1920s, an attempt was

made by the League of Nations to codify customary international law on this matter.[142] However, no great progress was made until the adoption of the ILC Articles on Responsibility of States for Internationally Wrongful Acts in 2001. The ILC Articles reflect existing law to a great extent and in some respects develop the law on State responsibility progressively.[143]

The codification of the ILC Articles took a fairly long period of time and involved five successive outstanding Special Rapporteurs (F. V. García Amador; Roberto Ago; Willem Riphagen; Gaetano Arangio-Ruiz; and James Crawford). At its first session in 1949, the International Law Commission (ILC) placed State responsibility on a provisional list of fourteen topics which were to be codified.[144] In 1953 the UN General Assembly formally requested the ILC to undertake the codification of the principles of international law governing State responsibility.[145] In 1996, a draft was adopted on first reading, which caused much controversy and led to the final edition in 2001. Finally, the UN General Assembly, in its resolution 56/83 in 2001, took note of the Draft Articles and recommended that they be given attention by the governments without prejudice to the question of their future adoption or other appropriate action.[146] After that, several more resolutions were adopted, calling further attention to the ILC Articles and making it necessary to examine further the question of creating a convention on State responsibility or other appropriate action on the basis of the ILC Articles.[147]

The ILC Articles are not adopted in the form of a legally binding treaty. Some articles have reflected customary international law, but some involve the

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[142] ANTONIO CASSESE, INTERNATIONAL LAW (Oxford University Press Second ed. 2005). p.242.
[143] Id, p.244.
[144] BROWNLIE, State Responsibility: Part I. 1983. p.13.
[145] Id.
[146] United Nations, General Assembly Resolution 56/83, 2001, A/RES/56/83.
[147] United Nations, General Assembly Resolution 59/35, 2004, A/RES/59/35; General Assembly Resolution 62/61, 2007, A/RES/62/61; General Assembly Resolution 65/19, 2010, A/RES/65/19; General Assembly Resolution 68/104, 2013, A/RES/68/104.

progressive development of the law.[148] These articles per se are not a source of law, but they may serve as evidence of a source of law.[149] In practice they have been invoked widely by international tribunals such as the ICJ, the ICTY, the WTO Appellate Body, and the ICSID arbitration tribunals.

2.2. The Characteristics of the ILC Articles

The rules on State responsibility are generally considered to be secondary rules.[150] The ILC Articles focus on what the second Special Rapporteur Roberto Ago termed secondary rules, that is, the framework rules of attribution, breach, excuses, reparation, and response to breach—as distinct from primary obligations the breach of which gives rise to responsibility.[151] However, we should also notice that the division between primary rules and secondary rules is not always clear cut especially when we talk about attribution issues. For example, Article 6 of the Outer Space Treaty prescribes that State parties shall bear international responsibility for national activities in outer space, whether such activities are carried out by governmental agencies or by non-governmental entities.[152] Another example is Article 139 of the United Nations Convention on the Law of the Sea. One may argue that they are special rules on attribution (secondary rule), but one may also argue that they are primary rules requiring a State to regulate non-State actors.

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[148] David Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 857(2002).p.858.
[149] Id, p.867.
[150] MALCOLM N. SHAW, INTERNATIONAL LAW (Cambridge University Press Sixth ed. 2008). p.778.
[151] JAMES CRAWFORD & IAN BROWNLIE, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (Oxford University Press eighth ed. 2012). p.540. It is worth noting that not every single rule in the ILC Articles is a secondary rule. Some authors argue that rules relating to circumstances precluding wrongfulness are not secondary rules but primary rules.
[152] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.

The ILC Articles are general rules on State responsibility.[153] The ILC Articles *per se* apply to State responsibility arising out of a breach of a human rights obligation, which is owed by a State not only to another State but also to individuals and sometimes even to the international community as a whole. Notwithstanding the character of general application, the ILC Articles *per se* permit a deviation of these rules by special rules (‘*lex specialis’*) of international law. Article 55 of the ILC Articles allows for special rules on State responsibility.

2.3. The Problems of the ILC Articles When Applied to Human Rights Issues

Although the ILC Articles are intended to be applied to human rights issues unless there are special rules under the meaning of Article 55, there are some doubts as to whether these articles have reflected the developments in the field of human rights protection, and whether it is appropriate to apply these articles to human rights law.

Andrew Clapham has argued that the international law on State responsibility is not, and should not be, considered appropriate in some aspects when applied to human rights issues.[154] According to Clapham, effective protection of human rights demands States to control private actors and this would encounter a difficulty due to the attribution issue under secondary rules.[155] Clapham has further argued that the distinction between public and private in the field of human rights is to some extent arbitrary, and that the ILC Articles lack flexibility because the acts of a private actor are either completely attributed to a State or completely not.[156] Christine Chinkin has challenged the traditional public/private dichotomy in international law

[153] United Nations, Yearbook of the International Law Commission 2001, Volume II, Part Two. A/CN.4/SER.A/2001/Add.1 (Part 2). p.32.
[154] ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (Oxford University Press. 1993).p.188.
[155] Id, p.104.
[156] Id, pp.127-133.

and has argued that such a dichotomy ignores State responsibility for violations committed within the private sector, especially in the field of human rights law.[157]

By contrast, Rick Lawson has contended that Clapham's criticism is falsely targeted. Lawson has argued that the special nature of human rights treaty which grants remedies to individuals does not preclude the applicability of the rules on State responsibility.[158] Bruno Simma and Dirk Pulkowski also think that State responsibility arises due to a breach of State obligation, irrespective of who has the right to invoke it and in which fashion.[159] Lawson further argued that some disappointing judgements in cases where private abusers are involved resulted from the application of primary rules rather than secondary rules on State responsibility.[160] Another scholar has expressed a similar opinion that:

> Any critique against State responsibility provisions for being insufficient for protecting human rights is falsely targeted. A critique of the extent of obligations should rather be directed at the 'primary' rules, i.e. human rights conventions.[161]

The above scholars, different from Clapham, have proposed to address the problem of private abusers in the context of primary rule obligations. Their opinions are based on a strict distinction between primary rules and secondary rules and they can to a large extent maintain the secondary rules as unified and stable. However, primary rules and secondary rules are interrelated in relation to human rights

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[157] Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 387(1999).p.395.
[158] Rick Lawson, *Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' Meet the Challenges of the 21st Century?*, *in* THE ROLE OF THE NATION STATE IN THE 21ST CENTURY: HUMAN RIGHTS INTERNATIONAL ORGANISATIONS AND FOREIGN POLICY: ESSAYS IN HONOUR OF PETER BAEHR (Monique Castermans-Holleman, et al. eds., 1998).p.91.
[159] Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 483(2006). p.525.
[160] Lawson, Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' Meet the Challenges of the 21st Century? 1998.
[161] Viljam Engström, *Who Is Responsible for Corporate Human Rights Violations at* http://www.abo.fi/institution/en/onlinepublications. (last accessed 18-01-2014).

violations: different type of attribution entails different type of obligations in a given situation. In fact, the problem of private abusers could be addressed either by attributing more to States or by developing positive obligations in primary rules.[162]

In addition, international human rights law has had a significant impact on the general international law of State responsibility which has accepted that States have positive obligations.[163] A State may breach the positive obligation of due diligence even when the acts of a non-State actor cannot be directly attributed to the State.[164] In this sense, the tension between international human rights law and the general international law of State responsibility has been mitigated. In fact, the notion of the obligation to protect or due diligence in human rights law has to some extent conflated the elements of both primary and secondary rules.[165] This concept, which requires a State to deter a private abuser, is an effort to coordinate primary and secondary rules. In light of different opinions, this book addresses the problem of the human rights damage caused by a State-owned corporation by developing secondary rules on attribution issues, because a State-owned corporation has a close link to the State as owner. The problem of the human rights damage caused by an ordinary company will be tackled under the framework of primary rules. As this chapter later reveals, a special rule of attribution for State-owned corporations is needed in human rights law. Such a special rule does not change but rather complements the general rule of attribution.

3. Direct Attribution and Indirect Attribution

According to the ILC Articles, a State is responsible for an internationally wrongful act (consisting of an action or omission) which can be attributed to it. An action of a

[162] Monica Hakimi, *State Bystander Responsibility*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 341(2010).p.348.
[163] Robert McCorquodale, *Impact on State Responsibility*, *in* THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW (Menno Kamminga ed. 2009).p.251.
[164] Id, p.247.
[165] Aoife Nolan, *Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional Approaches to the 'Obligation to Protect'*, 9 HUMAN RIGHTS LAW REVIEW 225(2009).p.231.

State refers to any positive act which is attributable to it. If a certain action is internationally wrongful, its wrongful character derives from the State's negative obligation under public international law.[166] An omission is inaction of a State. In general, a State is responsible for its inaction when it is obliged to carry out some positive measures.[167] If an omission is internationally wrongful, its wrongful character derives from the State's positive obligation under public international law.[168]

The demarcation between an action and omission is not always clear-cut.[169] It is particularly the case when private actors are involved. An action of a corporation could be considered as an action of a State in accordance with Article 4, Article 5 or Article 8 of the ILC Articles. However, an omission of a corporation may cause confusion. In the case of a corporation controlled by a State organ, for example, is the omission of that corporation still an omission of the State, or an action of that State? Does it entail State negative obligation or positive obligation? In fact, it is hard for Article 4, Article 5, and Article 8 to fit into the dichotomy of action and omission. Instead, this chapter adopts another dichotomy, namely direct attribution and indirect attribution.[170] It is based on the distinction between wrongfulness caused by the State or by persons whose conduct is directly attributable to the State, and wrongfulness caused by third persons and not directly attributable to the State.[171] The first case leads to objective responsibility; the second case leads to subjective responsibility.[172] The latter is also referred to as responsibility for lack of

[166] Franck Latty, *Actions and Omissions*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY (James Crawford, et al. eds., 2010).
[167] AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW, THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 (American Law Institute Publishers. 1987). p. 99.
[168] Latty, Actions and Omissions. 2010.
[169] Id.
[170] Jan Arno Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 INTERNATIONAL LAW AND POLITICS 265(2004).p.268.
[171] Vassilis P. Tzevelekos, *Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility*, 36 MICHIGAN JOURNAL OF INTERNATIONAL LAW 129(2014).p.131.
[172] Id, pp.132-133.

diligence.[173] According to Vassilis Tzevelekos, if a non-State actor perpetrates a wrongful conduct, there might be no State directly responsible, but multiple States that are expected to react pursuant to their positive obligations.[174] A direct attribution could be based on Article 4, Article 5 and Article 8 of the ILC Articles. An indirect attribution derives from the failure to regulate a non-State actor by a State organ (Article 4 in a broad sense).

In a single situation there may be several different instances of attribution.[175] Direct and indirect attribution could co-exist in a given case. It is also possible that no direct attribution exists in a specific situation.[176] As far as the topic of this book is concerned, there at least involve a home State and a host State of MNC. Two scholars have used the term 'shared responsibility' to indicate the responsibility of multiple actors for their contribution to a single harmful outcome.[177] But they also admit that independent responsibility is applicable in situations of cumulative responsibility where each of the individual acts in itself is a violation of an international obligation.[178] This book does not research how to allocate responsibility between a home State and a host State, but it aims to explore whether it is possible for a home State to be responsible for its own international wrongful act.

Different type of attribution corresponds to different type of human rights obligations. A direct attribution links to negative human rights obligations; an indirect attribution links to positive human rights obligations. In human rights law, the extraterritorial aspects of the obligation to respect human rights are much clearer and more solid than those of the obligations to protect and fulfill human

[173] Robert McCorquodale, *Impact on State Responsibility*, *in* THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW (Menno Kamminga ed. 2009).p.247.
[174] Tzevelekos, Supra note 171, p.134.
[175] Id.
[176] Id.
[177] Andre Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 MICHIGAN JOURNAL OF INTERNATIONAL LAW 359(2013).p.367.
[178] Id, p.388.

rights.[179] Due to a lack of explicit and concrete provisions in human rights treaties, however, it is not clear whether a home State has positive obligations to prevent corporate human rights abuses in a host State. An author asserted more than twenty years ago that positive obligations are difficult to be accepted in the absence of clear language.[180] However, that author overlooked the practice of human rights treaty bodies and tribunals. (He came to that conclusion by studying cases of the ICJ and the Iran-United States Claims Tribunal). In fact, his conclusion has been proven incorrect by reference to the practice of the European Court of Human Rights. The European Court of Human Rights has been active in developing positive State obligations.[181] It is important to explore in this book whether a home State has positive obligations to prevent corporate human rights abuses in a host State, taking into account new developments on this issue through the practice of different human rights treaty bodies.

4. A Direct Attribution of Corporate Conduct to a Home State

There are three legal bases on which corporate conduct may be directly attributable to the State concerned, namely Article 4 on 'conduct of organs of a State', Article 5 on 'conduct of persons or entities exercising elements of governmental authority', and Article 8 on 'conduct directed or controlled by a State'.

4.1. Conduct of a State Organ

4.1.1 State Organ in General

The conduct of any State organ is by its nature attributed to that State according to Article 4 of the ILC Articles. This article does not provide a clear definition of a State organ. A paradoxical character can be found in this article. On the one hand,

[179] Coomans, Supra note 66, p.34.
[180] Gordon A. Christenson, *Attributing Acts of Omission to the State*, 12 MICHIGAN JOURNAL OF INTERNATIONAL LAW 312(1991).
[181] DIMITRIS XENOS, THE POSITIVE OBLIGATIONS OF THE STATE UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS (Routledge. 2012). pp.213-214.

the ILC seems to have realized that a State is free to determine and organize its own organs by virtue of its sovereignty. But the ILC does not completely trust a State's internal law, because otherwise it would have employed such an expression as 'the status of a State organ is subject to the internal law of a State'. On the other hand, for fear of destroying the principle of State sovereignty, the ILC did not articulate a general standard rather than the internal law of a State. It should be noted that 'legislative, executive, judicial or any other function' under Article 4 is not the criterion for identifying a State organ, because it is merely a description and not the definition of a State organ.[182]

According to Article 4, a person or an entity should be considered to be a State organ if such a status is provided for by the internal law of a State. However, there is a gap when the internal law of a State precludes a person or an entity from being considered a State organ. Can we say that the person or the entity is not a State organ? The answer seems to be negative in accordance with the commentary to Article 4, which states that: 'In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading.'[183] Although the ILC has moved beyond internal law by reference to the practice of a State, it has not provided an objective standard for a State organ. It seems that the ILC is inclined to leave this question to judicial discretion on a case-by-case basis.

The ICJ has filled in the gap by introducing a 'complete dependence' standard when interpreting Article 4 of the ILC Articles. In the *Genocide case*, one of the questions faced by the court is 'whether the acts of genocide committed in Srebrenica were perpetrated by persons or entities having the status of organs of the

[182] United Nations, Yearbook of the International Law Commission 2001, Volume II, Part Two. A/CN.4/SER.A/2001/Add.1(Part 2), p.40.
[183] Id, p.42.

Federal Republic of Yugoslavia'.[184] After examining the internal law of that State, no affirmative answer could be given. The court then observed that:

> Persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument.[185]

According to the ICJ, if a person or an entity is merely an instrument of a State and does not enjoy any margin of independence, then this person or entity should be deemed as a State organ.

There is little dispute that ordinary corporations (owned by private or State's shares not amounting to the majority) are not State organs. Therefore, the conduct of these corporations cannot be directly attributed to a State under Article 4. What can be attributed to a certain State is the inaction of its State organ, if it does not react properly, when such corporations have abused human rights.

4.1.2. State-owned Corporations as State Organs?

Article 4 of the ILC Articles never precludes the possibility of a State-owned corporation being regarded as a State organ according to the internal law or practice of a State. The internal law of a State is decisive in the affirmative aspect. If the internal law of a State characterizes a State-owned corporation as its State organ, then this corporation should be considered to have such a status for the purpose of attribution. However, it is insufficient to conclude that a State-owned corporation is not a State organ by the mere fact that the internal law does not recognize that status. Otherwise, a State would 'avoid responsibility for the conduct of a body

[184] The ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, para.386.
[185] Id, para.392.

which does in truth act as one of its organs merely by denying it that status under its own law'.[186] In this situation, it is necessary to look into the actual practice of that State in accordance with the complete dependence standard developed by the ICJ.[187]

Nowadays, it is quite difficult to find a corporation (even a State-owned corporation) that acts in complete dependence on a State. Several cases have come before the International Centre for Settlement of Investment Disputes (the ICSID) tribunals regarding the attribution of conduct of State-owned corporations to a State. These tribunals were more willing to rely on Article 5 or Article 8 than Article 4 of the ILC Articles. They did so by coming to a negative conclusion hastily as to the question of attribution based on Article 4. In the *Noble Ventures v. Romania case*, the tribunal denied attribution based on Article 4 for the simple reason that State-owned corporations were legal entities separate from a State.[188] The tribunal did not examine in detail whether those State-owned corporations act in complete dependence on a State. Finally, in that case, the tribunal came to an affirmative conclusion for the attribution issue by reference to Article 5 of the ILC Articles.[189] It would be a better award if the tribunal had simply stated that there was no need to consider the issue under Article 4 because reference to Article 5 was enough, rather than directly denying the possibility of attribution based on Article 4.

The ICSID case indicates that it is difficult to prove that State-owned corporation is a State organ, but there is a great possibility that the conduct of these corporations can be attributed to a State based on Article 5 or Article 8 of the ILC Articles.

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[186] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY (Cambridge University Press. 2002). p.98.
[187] Supra note 185.
[188] The ICSID, Noble Ventures v. Romania, Case No. ARB/01/11, Award of 12 October 2005.
[189] Id.

4.2. Conduct of Persons or Entities Exercising Elements of Governmental Authority

Article 5 of the ILC Articles provides that: 'The conduct of a person or entity … which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity ...'[190] It is possible that a corporation is empowered by the law of a State to exercise some governmental authority. For example, some airlines may be authorized to exercise some power of immigration control of a State. In another instance, a railway company could be given certain coercive powers from a State. In these cases, corporate conduct which relates to the exercise of governmental authority should be considered as a State act.

Article 5 has not defined the scope of governmental authority. According to the official commentary to Article 5, what is regarded as 'governmental' depends on the particular society, the history and traditions of a State.[191] In most cases, a corporation is authorized to exercise governmental authority within a State's own territory. However, it is also possible that a corporation is authorized to exercise governmental authority abroad. For example, the Chinese government has authorized certain Chinese corporations to implement its development assistance policy abroad. China has for a long time been active in providing development assistance to developing countries. According to a regulation of the Chinese Ministry of Commerce, foreign aid is mainly implemented in the form of intergovernmental aid.[192] The regulation provides that foreign aid should be mainly

[190] United Nations, Yearbook of the International Law Commission 2001, Volume II, Part Two. A/CN.4/SER.A/2001/Add.1(Part 2), p.42.
[191] United Nations, Yearbook of the International Law Commission 2001, Volume II, Part Two, p.43.
[192] 中国商务部:《对外援助管理办法（试行）》,商务部令 2014 年第 5 号,2014 年 11 月 15 日. (The Chinese Ministry of Commerce, Administrative Measures for Foreign Aid (provisional), the Order No. 5 [2014] of the Ministry of Commerce, 15 November 2014, available at: http://www.mofcom.gov.cn/article/b/c/201411/20141100799438.shtml (last accessed 10-03-2016), Article 13.)

carried out through building projects in the receiving countries.[193] The Chinese government normally authorizes a Chinese company to build a complete project.[194] Another regulation of the Chinese Ministry of Commerce specifically deals with the complete project of development assistance. The second regulation provides for the means of selecting and supervising Chinese companies that will implement a complete project of development assistance.[195]

Development assistance (governmental foreign aid) is a part of the foreign affairs policy of a donor State. It is arguable that the conduct of a corporation authorized by the Chinese government to implement a complete project of development assistance can be attributed to China. A specific example could be the following: a Chinese company is authorized by the Ministry of Commerce to build a dam in a receiving country as a development assistance project; the company abuses human rights during its dam construction, for example committing a forced eviction; the abuse itself (forced eviction) can be attributed to China. In the above example, China's negative obligation is in question because the abuse (forced eviction) is considered to be China's own act.

4.3. Conduct Directed or Controlled by a State

4.3.1. Article 8 of the ILC Articles

As a general principle, the conduct of private persons or entities is not attributable to a State under international law. However, Article 8 deals with two exceptional circumstances. The first one is the case of 'private persons acting on the instructions of the State in carrying out the conduct'. The second one concerns 'private persons act under the State's direction or control in carrying out the

[193] Id, Article 14.
[194] Id, Article 23.
[195] 中国商务部:《对外援助成套项目管理办法（试行）》,商务部令 2015 年第 3 号,2015 年 12 月 9 日. (The Chinese Ministry of Commerce, Administrative Measures for the Complete Project of Foreign Aid (provisional), the Order No.3 [2015] of the Ministry of Commerce, 9 Dec 2015, available at: http://www.mofcom.gov.cn/article/b/c/201512/20151201216068.shtml (last accessed 10-03-2016).)

conduct'. First of all, the differentiation among the three keywords 'instruction', 'direction' and 'control' is not so clear. Some scholars consider that the term 'direction' has a similar meaning to 'instruction' because both involve very specific orders or instructions given by States.[196] However, the ILC put the 'direction' into the same group with 'control' and considered them to have the same meaning.[197]

With regard to the first circumstance, there are few cases where (or there is little evidence that) corporations abused human rights under the specific instructions of a State. If that is the case, that conduct is without any doubt attributed to the State concerned. After the Iraq Invasion in 2003, for example, some private corporations were contracted by the occupying forces to provide a wide variety of services. It is arguable that the conduct of those corporations is attributed to the State involved (the occupying powers).[198]

Controversy arises as to the understanding of the second circumstance, namely 'conduct directed or controlled by the State'. Disputes concentrate on the exact meaning of control. Different opinions had been expressed even before the final adoption of the ILC Articles, through the case law of the ICJ and the ICTY (respectively the ICJ *Nicaragua* case in 1986 and the ICTY Appeals Chamber *Tadić* case in 1999). The ICJ came up with the 'effective control' test, whereas the ICTY Appeals Chamber considered that the degree of control may vary according to the factual circumstances of each case and that 'overall control' should be the test for attribution of conduct of organized groups.[199] One scholar comments that the ILC did not take one over the other and that the formulation that was ultimately chosen by the ILC is a good compromise, in the sense that it is vague enough to

[196] Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 649(2007). p.663.
[197] United Nations, Yearbook of the International Law Commission 2001, Volume II, Part Two. A/CN.4/SER.A/2001/Add.1 (Part 2), p.47.
[198] Robert McCorquodale, *Corporate Social Responsibility and International Human Rights Law*, 87 JOURNAL OF BUSINESS ETHICS 385(2009). p.388.
[199] ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, para.115. ICTY, the Prosecutor v. Duško Tadić, in the Appeals Chamber, Judgment of 15 July 1999, para.131.

allow different interpretations.[200] The ICJ reiterated the 'effective control' test in its 2007 Judgment of the *Genocide* case.

The judgments of the three cases need to be recalled because those courts intended to interpret the meaning of control for the purpose of attribution. There are some arguments that the ICTY's interpretation is irrelevant to the issue of attribution, because the ICTY tribunal's mandate is directed at the issues of individual criminal responsibility, not State responsibility.[201] However, even if it is possible to contest the invocation of the rules on State responsibility by the ICTY, its interpretation of control itself is not necessarily wrong.[202] After a case study of these three judgments, this chapter reveals that both the ICJ and the ICTY have emphasized that control must be in fact exercised by a State. This idea deeply influenced the ILC, which adopted a similar interpretation.[203] However, they did not give full consideration to situations in which a State has potential to exercise control. In fact, when we discuss State-owned corporations, an important aspect is that owner States have the power or ability to control them. In this sense, we should look beyond the *Nicaragua*, the *Genocide,* and the *Tadić* cases when we think of attribution issues concerning State-owned corporations. Before doing that, we need to examine these three cases carefully.

4.3.2. The ICJ's Interpretation

4.3.2.1. The *Nicaragua* Case

The ICJ adopted the 'effective control' standard in the *Nicaragua* case for the first time when dealing with acts committed by an entity not regarded as a State organ.

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[200] Olivier De Frouville, *Attribution of Conduct to the State: Private Individuals*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY (James Crawford, et al. eds., 2010).
[201] CRAWFORD, The International Law Commission's Articles on State Responsibility 2002. p.112.
[202] Frouville, Attribution of Conduct to the State: Private Individuals. 2010.
[203] United Nations, Yearbook of the International Law Commission 2001, Volume II, Part Two. A/CN.4/SER.A/2001/Add.1 (Part 2), p.48, para.6.

At the time when the ICJ delivered its judgment in 1986, the 2001 edition of the ILC Articles did not exist. However, between 1969 and 1980 the ILC provisionally adopted on first reading the whole of Part one of the draft articles, concerning 'origin of international responsibility'.[204] The expression of 'on behalf of the State' of the original version has been replaced by 'on the instructions of, or under the direction or control of the State' of the current version of the ILC Articles.[205] When dealing with the *Nicaragua* case, the ICJ on one hand employed the 'dependence' criterion to identify a State organ. On the other hand, the ICJ employed the 'control' criterion to examine whether an entity is 'acting on behalf of the State'.[206] It seems that the ICJ has conflated control and instruction in the *Nicaragua* case.

The ICJ has stated in the *Nicaragua* case that only financing or training support to a group could not give rise to the attribution of the act committed by the group to the State.[207] According to the ICJ, 'effective control' is needed for the attribution.[208] The ICJ did not give a definition of effective control and it just rejected the idea that assistance or support itself suffices to constitute effective control. In fact, assistance or support is not control at all in the ordinary meaning of the terms. In this sense, it is tautological to use 'effective' to describe 'control'.

4.3.2.2. The *Genocide* Case

The ICJ reiterated the 'effective control' standard in the *Genocide* case. At the time of this judgment, the 2001 ILC Articles already existed. The ICJ explicitly relied on these articles.[209] In the *Genocide* case, the ICJ recalled its judgment in the

[204] James Crawford, Articles on Responsibility of States for Internationally Wrongful Acts: Historical background and development of codification, available at: http://legal.un.org/avl/ha/rsiwa/rsiwa.html (last accessed 15-02-2014).
[205] United Nations, Yearbook of the International Law Commission 1974, Volume I. pp.152-153.
[206] ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, para.109.
[207] Id.
[208] Id, para.115.
[209] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007. para.396.

Nicaragua case and further argued that effective control should be exercised in respect of each operation for the purpose of attribution.[210]

The phrase of effective control refers to a certain degree of control from its semantic meaning. However, the ICJ did not elaborate on the meaning of effective control from the perspective of the degree of control, but merely stressed the scope of control by highlighting 'in respect of each operation' by contrast to 'in respect of the overall actions'. But regardless of 'each operation' or 'overall actions', it has nothing to do with the degree of control. In other words, the ICJ did not make a clear distinction between what is 'effective' and what is 'ineffective' in terms of the degree of control. In this sense, the word 'effective' is not restrictive but merely descriptive in relation to the word 'control'.

The ICJ has produced many excellent judgments, but its judgment on the *Genocide* case is by no means one of them. The biggest problem is the swaying attitude of the ICJ towards the nature of Article 8. In its judgment in the *Genocide* case, the ICJ at first held that the responsibility incurred under Article 8 of the ILC Articles derived from the conduct of the State organ in giving instructions or exercising the control in question.[211] For example, the ICJ stated that:

> An affirmative answer to this question (whether the person or group of persons is acting on the instructions of, or under the direction or control of, that State) would in no way imply that the perpetrators should be characterized as organs of the FRY, or equated with such organs. It would merely mean that the FRY's international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions

[210] Id, para.400.
[211] Jörn Griebel & Milan Plücken, *New Developments regarding the Rules of Attribution? The International Court of Justice's Decision in Bosnia v. Serbia*, 21 LEIDEN JOURNAL OF INTERNATIONAL LAW 601(2008). p.606.

> or exercised the control resulting in the commission of acts in breach of its international obligations.[212]

Here, the ICJ did not consider Article 8 as an attribution rule at all and it regarded State organ (de jure or de facto) as the sole basis for attribution.

The above-mentioned paragraph taken from the judgment indicates that the ICJ's understanding of Article 8 is not in conformity with that of the ILC, although the ICJ purported to base its decision on the ILC Articles. The ICJ failed to consider control as an independent basis for attribution, while the ILC considered it to be. In the ILC Articles, Article 8 falls within the same chapter entitled 'attribution of conduct to a State' as Article 4. From the ILC's commentary to Article 8, one can clearly find that the ILC regards this article as an attribution rule.[213] However, the ICJ did not provide any convincing reason for its different interpretation of the nature of Article 8. The ICJ turned Article 8 into a primary rule which prohibits a State organ from supporting private actors who commit violations of international law. Some scholars have criticized that the ICJ abolished Article 8 as an attribution rule.[214] From this point of view, the ICJ's interpretation is problematic, because it has misunderstood the legal nature of Article 8.

4.3.3. The ICTY's Interpretation

In the *Tadić* case, the ICTY Appeals Chamber interpreted Article 8 of the draft articles adopted on the first reading by the ILC.[215] First, the ICTY Appeals Chamber interpreted that article deliberately. Indeed, the Chamber also realized the difference between State responsibility and individual criminal responsibility.

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[212] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, para.397.
[213] United Nations, Yearbook of the International Law Commission 2001, Volume II, Part Two. A/CN.4/SER.A/2001/Add.1 (Part 2), p.47.
[214] Supra note 211, p.609.
[215] United Nations, Yearbook of the International Law Commission 1974, Volume I. p.152.

However, the Chamber thought that the attribution rule is relevant for determining whether the armed conflict in that case is an international conflict.[216]

Thereafter, the Chamber turned to interpret the meaning of control for the purpose of attribution. It stated in general that:

> The degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.[217]

Therefore, the ICTY Appeals Chamber did not set a uniform criterion for the degree of control, which could vary depending on circumstances.

The ICTY Appeals Chamber made a distinction between acts performed by private individuals and acts performed by individuals making up an organized and hierarchically structured group. In the former case, specific instructions from a State concerning the performance of each action are required for the purpose of attribution, whereas in the latter case 'overall control' by a State over a group is sufficient for attributing the acts of that group to the State.[218] Without thoroughly denying the 'effective control' standard, the ICTY Appeals Chamber argued that the 'overall control' standard coexists with the former and can be applied to the case of organized groups, especially in the case of military or paramilitary groups.[219]

Subject to the draft articles at that time, Article 8 of which only stipulated 'on behalf of the State' in a general way, the ICTY seemed to consider the situation of 'overall control' as parallel to the situation of 'specific instruction'. In the view of the Appeals Chamber, the phrase 'on behalf of the State' consists of two situations,

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[216] ICTY, the Prosecutor v. Duško Tadić, in the Appeals Chamber, Judgment of 15 July 1999, para.104.
[217] Id.
[218] Id, para.120.
[219] Id, para.124.

namely 'overall control' and 'specific instruction'. In this sense, the word 'control' used in the *Tadić* case is much closer to the same word used by the 2001 ILC Articles than the *Nicaragua* case. The ICTY considered that the 'effective control' test in the *Nicaragua* case in fact reflected the situation of 'specific instruction' and therefore it put forward the 'overall control' test as an alternative.

The ICTY Appeals Chamber has elaborated on the meaning of 'overall control'. It has noted that:

> In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.[220]

Therefore, the ICTY has also required a certain degree of control. Only the financing support is insufficient in this regard. Instead, it needs to prove that a State coordinates or helps a group in the general planning of its activity. The ICTY has put forward the overall control criterion for the attribution issue concerning military entities. It has made a contribution to attribution issues by clarifying that the degree of control could vary depending on different kinds of entities.

4.3.4. Is Effective Control or Overall Control Standard Fit for Attribution Issues concerning State-owned Corporations?

4.3.4.1. Are the Two Criteria Substantially Different?

A careful examination of the judgments of the two tribunals leads to the following observations. Notwithstanding the semantic difference, there is hardly any substantial conflict between the 'effective control' and the 'overall control' standards respectively formulated in the case law of the ICJ and the ICTY. Literally, the degree of 'effective' sounds stronger than that of 'overall'. However, the ICJ did not explain how effective control should be in both the *Nicaragua* and the

[220] Id, para.131.

Genocide cases. Rather, what was stressed in the *Genocide* case is the scope of actions effectively controlled by a State, which was highlighted by the ICJ as 'in respect of each operation'.[221] The ICTY never stated that the control could be ineffective, but it merely pointed out that the overall control over a group is sufficient for the attribution of conduct of organized groups.[222] It seems that the difference between the two tests, if any, turns out to be whether the control is exercised in respect of 'each operation' or 'overall actions'.

Unlike the term 'instruction', which is a momentary action, 'control' denotes a continuous status. The purpose of the ICTY, when interpreting the meaning of 'on behalf of the State', to antecede the word 'control' with the word 'overall' is to distinguish it from instruction, which should be specific with regard to each operation. As mentioned above, 'on behalf of the State' in the first edition of the draft articles was replaced by 'on the instructions of, or under the direction or control of the State' in the 2001 edition. Therefore, the word 'overall' was employed to distinguish control from instruction, rather than denying the effectiveness of control that is required for the purpose of attribution. Above all, there is no substantial difference between the so-called 'effective control' and 'overall control' tests. According to the ICJ and the ICTY, a control should be effective and only financing support from a State is insufficient to constitute a qualified control. Unlike the case of instruction, the situation of control does not entail very specific orders from a State in respect of each operation.

4.3.4.2. Are They Fit for Attribution Issues concerning State-owned Corporations?

A common point of the effective control and overall control criteria is that only financing support from a State is insufficient to constitute a qualified control. For attribution, one at least has to prove that a State substantially coordinates or helps a

[221] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, para.400.
[222] ICTY, the Prosecutor v. Duško Tadić, in the Appeals Chamber, Judgment of 15 July 1999, para.131.

group in the general planning of its activity. The ICJ and the ICTY have interpreted control as an exercise of a *de facto* control and they have overlooked situations in which a State has the ability to control an entity such as a State-owned corporation. The ILC has generally followed their interpretation.[223] However, the ordinary meaning of control at least includes the case of the power to control someone.[224] Of course, legislation could confer a special meaning upon a word due to special consideration. But we may question whether the ILC Articles have fully considered problems caused by State-owned corporations which are at least under the potential control of a State.

If we apply the effective control or overall control criterion to State-owned corporations, we can conclude that the mere fact that a State holds the stock of a State-owned corporation does not constitute qualified control. Theoretically, it is possible to prove that a State substantially coordinates or helps a State-owned corporation in the general planning of its activity and therefore establishes an attribution. In reality, however, a State usually proclaims that its State-owned corporations operate according to the principle of the separation of ownership and managerial authority. A State could always argue that it merely acts as a stockholder of a State-owned corporation and that it is uninvolved in the business of its State-owned corporation. The conduct of a State-owned corporation is theoretically attributed to a State according to the effective control or overall control criterion. However, in reality, it is difficult to prove such an attribution, because it is hard for a third person to prove the real relationship between a State and its State-owned corporations.

In fact, the effective control or overall control criterion has been developed through cases concerning military entities. It is arguable that a State-owned corporation is different from a military entity. The military entities in the ICJ and the ICTY cases

[223] United Nations, Yearbook of the International Law Commission 2001, Volume II, Part Two. A/CN.4/SER.A/2001/Add.1 (Part 2), p.48, para.6.
[224] See Cambridge Dictionary, available at: http://dictionary.cambridge.org/dictionary/english/control (last accessed 15-12-2016).

are not created or founded by the State concerned. But a State-owned corporation is usually created or tantamount to being created (by purchasing stocks) by a State. This book accepts the ICTY's jurisprudence that different entities deserve different criteria for attribution issues. Therefore, a more reasonable and practical criterion is needed for the attribution issue concerning State-owned corporations.

5. Attribution for State-owned Corporations beyond the *Nicaragua* and *Tadić* cases

5.1. The ECtHR Case Law

The ECtHR has specifically dealt with attribution issues concerning a corporation that has special links with a State, such as socially-owned companies in Serbia and State-owned corporations in general. In the *Kačapor and others v. Serbia* case, the ECtHR had the chance to deal with the question of whether the socially-owned company in this case is controlled by the State.[225] The Government argued that the State could not be held responsible for a socially-owned company, which was neither State-owned nor State-controlled.[226] The applicants submitted that the company was a socially-owned entity and, as such, fully controlled by the State.[227]

In Serbia, 'socially-owned companies as well as social capital are a relict of the former Yugoslav brand of communism and self-management'.[228] These companies, cannot, without prior approval by the Privatization Agency, itself a State body, adopt their own decisions concerning their: capital, re-organization, restructuring and investment, the partial sale or mortgage of their assets, the settlement of their outstanding claims and the taking or giving of loans and guarantees outside the scope of their regular business operations.[229] The ECtHR considers that the company, despite the fact that it is a separate legal entity, does not enjoy 'sufficient

[225] The ECtHR, R. Kačapor and Others v. Serbia, Applications nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, Judgment of 15 January 2008, paras.92-99.
[226] Id, para.92.
[227] Id, para.95.
[228] Id, para.71.
[229] Id, para.75.

institutional and operational independence' from the State to absolve the latter from its responsibility under the Convention.[230] The ECtHR did not mention the ILC Articles, and it has developed its own way to assess the attribution issue concerning a corporation that has special links with a State. This jurisprudence may also shed light on the attribution issues concerning State-owned corporations.

In the *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* case, the ECtHR applied the above jurisprudence to State-owned corporations. The applicants were three citizens of Bosnia and Herzegovina and one applicant was also a German citizen.[231] The applicants alleged that they were still not able to withdraw their old foreign-currency savings from their accounts at the Sarajevo branch (in Bosnia and Herzegovina) of the Ljubljanska Banka Ljubljana and the Tuzla branch (in Bosnia and Herzegovina) of Investbanka.[232] The ECtHR has stated that: '[A] Contracting State may be liable for debts of a State-owned company, even if the company is a separate legal entity, providing that the company does not enjoy sufficient institutional and operational independence from the State.'[233] The ECtHR has applied the reverse criterion of 'sufficient institutional and operational independence from the State' to the attribution issue concerning State-owned corporations.

In the *Zastava v Serbia* case, the ECtHR examined whether the applicant company (a Serbian socially-owned corporation) was entitled to make an application under Article 34 (on individual applications) of the ECHR.[234] According to Article 34 of the ECHR, individual applications can be submitted by 'any person, non-governmental organization or group of individuals claiming to be the victim of a

[230] Id, para.98.
[231] The ECtHR, Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia, Application no. 60642/08, 6 November 2012, para.1.
[232] Id, para.3.
[233] Id, para.68.
[234] The ECtHR, ZASTAVA IT TURS v. Serbia, Application no. 24922/12, Decision of 9 April 2013, para.19.

violation'.[235] The ECtHR held that the applicant company should be classified as a governmental organization, because it does not enjoy sufficient institutional and operational independence from the State.[236] Therefore, the ECtHR declared the application inadmissible.[237] Similarly, in the *Ljubljanska banka d.d. v. Croatia* case, the ECtHR held that Ljubljanska banka (a State-owned corporation of Slovenia) should be regarded as a governmental organization because 'it did not have sufficient institutional and operational independence from the State'.[238] It is unclear whether the opposite of a non-governmental organization under Article 34 of the ECHR is a State organ (under Article 4 of the ILC Articles) or both State organ and private entity controlled by a State (under Article 8 of the ILC Articles). However, it can be inferred from the ECtHR's jurisprudence that, if a State-owned corporation does not enjoy sufficient institutional and operational independence from a State, then its conduct can be attributed to the State.

In the above cases, the ECtHR did not refer much to proof about whether a State-owned corporation enjoys sufficient institutional and operational independence from a State.[239] It seems that the ECtHR has transferred the burden of proof to States. If a State cannot prove that its State-owned corporation enjoys sufficient institutional and operational independence, the conduct of its State-owned corporation should be attributed to the State. The ECtHR's jurisprudence reflects and responds to the troublesome reality of international society. Since a State can easily hide its connection with a State-owned corporation, it is difficult for a third party to prove the real relationship between a State and its State-owned corporations.

The ECtHR has devoted itself to the development of the special rule on attribution issues concerning corporations. The reverse criterion of 'sufficient institutional and

[235] Convention for the Protection of Human Rights and Fundamental Freedoms, Article 34.
[236] Id, para.22.
[237] Id, para.23.
[238] The ECtHR, Ljubljanska banka d.d. v. Croatia, application no. 29003/07, press release, 4 June 2015.
[239] Supra note 233.

operational independence' makes it possible for the ECtHR to balance the interests of individuals on one hand and of States on the other hand. The ECtHR has adopted a flexible approach to the attribution issue: on one hand, it is inclined to presume the attribution of the conduct of a State-owned corporation to the State; on the other hand, it leaves space for States to overthrow that presumption (threshold is unclear).[240] The process of balancing can be achieved by the ECtHR's judicial discretion. However, the judicial enforcement of universal human rights treaties is not as strong as the ECHR.[241] Therefore, the flexible approach to the attribution issue developed by the ECtHR, which relies on judicial discretion, may not be appropriate in the context of the core UN human rights treaties.

5.2. The WTO Case Law

5.2.1. An Introduction to the United States –Definitive Antidumping and Countervailing Duties on Certain Products from China Case

The WTO has dealt with the question whether Chinese State-owned corporations are public bodies within the meaning of the Agreement on Subsidies and Countervailing Measures (the ASCM) in the *United States –Definitive Antidumping and Countervailing Duties on Certain Products from China* Case (the US-China case). Although WTO law is sometimes considered to be a self-contained regime, this case is relevant for the attribution issues concerning State-owned corporations.

The US-China case concerns whether goods, services or loans provided by Chinese State-owned corporations (including some State-owned commercial banks) to some private corporations should be regarded as subsidies under the ASCM. According to Article 1.1 of the ASCM, if a State-owned corporation is considered to be a private body, then it requires proving the government's entrustment or direction for the concept of subsidy. However, if a State-owned corporation is considered to be a public body, then the goods, services or loans provided by it may directly constitute

[240] Id.
[241] WALTER KÄLIN & JÖRG KÜNZLI, THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION (Oxford University Press. 2009).p.208.

a subsidy.[242] In an investigation, the United States Department of Commerce (the USDOC) found that some Chinese State-owned corporations were public bodies within the meaning of Article 1.1 and thus the goods, services or loans provided by them should be regarded as actionable subsidies under the ASCM.[243] China objected to the USDOC's conclusion that State-owned corporations were public bodies.[244] The case was brought before the WTO and both the panel and the Appellate Body had to answer whether State-owned corporations are public bodies under the ASCM.

This case is relevant for the attribution issue and therefore deserves further discussion. Both the panel and the Appellate Body consider that Article 1.1 of the ASCM is in essence an attribution rule.[245] One of the differences between the decisions of the two bodies is their attitude towards the relevance of the ILC Articles for the interpretation of Article 1.1 of the ASCM. The panel considers that the ILC Articles are general rules and Article 1.1 of the ASCM is a special rule. Therefore, the panel does not consider the ILC Articles to be 'relevant rules of international law applicable to the relations between the parties' in the sense of Article 31(3)(c) of the VCLT.[246] According to the Appellate Body, although Article 1.1 of the ASCM is a special rule, the ILC Articles remain relevant for its

[242] For two approaches of proving a subsidy, please see Ru Ding, *Public Body or Not: Chinese State-Owned Enterprise*, 48 JOURNAL OF WORLD TRADE (2014). p.170.
[243] The WTO, United States –Definitive Antidumping and Countervailing Duties on Certain Products from China, Report of the Panel, WT/DS379/R, 22 October 2010, para.3.
[244] Id, para.5.
[245] The WTO, United States –Definitive Antidumping and Countervailing Duties on Certain Products from China, Report of the Panel, WT/DS379/R, 22 October 2010, para.8.90. The WTO, United States –Definitive Antidumping and Countervailing Duties on Certain Products from China, Report of the Appellate Body, WT/DS379/AB/R, 11 March 2011, para.308.
[246] The WTO, United States –Definitive Antidumping and Countervailing Duties on Certain Products from China, Report of the Panel, WT/DS379/R, 22 October 2010, para.8.91.

interpretation.[247] The following section explains how the panel and the Appellate Body interpret the attribution issues concerning State-owned corporations.

5.2.2. China's Main Arguments

China argues that the actions of State-owned corporations are *prima facie* private and thus presumptively not attributable to a WTO Member under Article 1.1 of the ASCM.[248] China considers that, while government ownership is relevant for the question of control, and thus for the inquiry in Article 1.1(a)(1)(iv) as to whether a private body has been directed to perform governmental functions, ownership has little relevance in determining whether an entity is a public body.[249] China asserts that, to be a 'public body', an entity must be authorized by the law of the State to exercise functions of a governmental or public character, and the acts in question must be performed in the exercise of such authority.[250]

China seems to admit that State control could cause the conduct of a State-owned corporation to be attributed to it, but China does not regard majority ownership as control. China also disagrees on the argument that the entrustment or direction standard is too burdensome and might be evaded when government-owned entities are involved.[251] China considers that the US improperly shifted the burden to China to disprove the presumption that all SOEs are public bodies.[252]

5.2.3. United States' Main Arguments

The United States notes that the term 'public body' in Article 1.1(a)(1) is part of the disjunctive phrase 'by a government or any public body'. The United States rejects

[247] The WTO, United States –Definitive Antidumping and Countervailing Duties on Certain Products from China, Report of the Appellate Body, WT/DS379/AB/R, 11 March 2011, para.316.
[248] The WTO, United States –Definitive Antidumping and Countervailing Duties on Certain Products from China, Report of the Panel, WT/DS379/R, 22 October 2010, para.8.4.
[249] Id.
[250] Id, para.8.5.
[251] Id, para.8.15.
[252] Id, para.8.18.

China's argument that the essence of a 'public body' should be the same as the essence of a 'government', namely to perform certain functions pursuant to government authority and power.[253] The United States holds that 'an entity will constitute a public body if it is controlled by the government (or other public bodies)'.[254] The United States considers that majority government ownership can demonstrate control, in that government ownership gives the government the ability to appoint managers and directors and thereby to oversee operations.[255]

5.2.4. The Panel

The panel disagrees with China and it concludes that a public body extends to entities controlled by governments and is not limited to government agencies and other entities vested with and exercising governmental authority.[256] The panel recalls that, in those investigations before the USDOC, the Government of China had not provided the information necessary (in most cases, China had provided only ownership information) to conduct a complete analysis.[257] The panel invokes the financial concept of a 'controlling interest' in a company[258] and concludes that, on its own, majority government ownership is clear and highly indicative evidence of government control and thus of whether an entity is a public body for the purposes of the ASCM.[259]

5.2.5. The Appellate Body

According to the Appellate Body, a public body within the meaning of Article 1.1(a)(1) of the ASCM must be an entity that possesses, exercises or is vested with

[253] Id, para.8.22.
[254] Id, para.8.30.
[255] Id.
[256] Id, para.8.73.
[257] Id, paras.8.128, 8.129, 8.130, 8.131.
[258] Id, para.8.134. The technical definition of what is needed for a controlling interest is a maximum of 50 per cent plus one share of the voting stock of a company, with the possibility that a much smaller voting block can be controlling, depending on how dispersed the ownership of the remaining shares is, and the extent to which the other shareholders participate in voting.
[259] Id, para.8.135.

governmental authority.[260] The Appellate Body notes that evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.[261] It stresses that the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity.[262] According to the Appellate Body, an investigating authority undertakes a high burden of proof.[263]

5.2.6. What Can We Learn from the US-China Case?

A difference can be found between the language of the ILC Articles and the ASCM: the former explicitly refers to control as an independent criterion for the attribution issue, whereas the latter does not specifically mention the case of control for the attribution issue.[264] The panel has in fact directly read the case of control into the concept of public body.[265] The Appellate Body has considered control as evidence of governmental authority.[266]

The biggest difference between the two decisions is in their understanding of control. The panel considers that, in the absence of other evidence, a majority government ownership could constitute control over a State-owned company.[267] The Appellate Body has stressed repeatedly that a majority government ownership does not demonstrate that the government exercises meaningful control over the

[260] The WTO, United States –Definitive Antidumping and Countervailing Duties on Certain Products from China, Report of the Appellate Body, WT/DS379/AB/R, 11 March 2011, para.317.
[261] Id, para.318.
[262] Id, para.318.
[263] Id, para.319.
[264] The Agreement on Subsidies and Countervailing Measures, Article 1.1.
[265] Supra note 256.
[266] Supra note 261.
[267] Supra note 257.

conduct of that entity.[268] However, the Appellate Body has not clarified what is control.

The concern of the US is not without grounds. On one hand, a State has the capacity to control a State-owned corporation if it has majority government ownership. On the other hand, a State can always deny that it exercises *de facto* control over its State-owned corporations. How could a third party know the real relationship between a State and its State-owned corporation? It is too burdensome for a third party to prove the real relationship between a State and its State-owned corporation beyond the ownership relationship.

5.3. A Special Rule of Attribution Concerning State-owned Corporations in Human Rights Law

An important characteristic of a State-owned corporation is that the government has ownership control over it. For example, the Public Finance Management Act of South Africa defines a national government business enterprise as an entity which is a juristic person under the 'ownership control' of the national executive.[269] 'Ownership control', in relation to an entity, means the ability to exercise any of the following powers to govern the financial and operating policies of the entity in order to obtain benefits from its activities: (a) to appoint or remove all, or the majority of, the members of that entity's board of directors or equivalent governing body; (b) to appoint or remove that entity's chief executive officer; (c) to cast all, or the majority of, the votes at meetings of that board of directors or equivalent governing body; or (d) to control all, or the majority of, the voting rights at a general meeting of that entity.[270] The ownership control indicates the ability to control, although an owner may not in reality interfere with the operation of a company.

[268] Supra note 262.
[269] South Africa, the Public Finance Management Act. (This Act has been updated to Government Gazette 33059 dated 1 April, 2010), Article 1.
[270] Id.

The ILC Articles have created a vacuum with regard to control. According to the ILC Articles, control is a matter of fact and it means *de facto* control.[271] But who has the burden of proof? Does a claimant State have to prove that a respondent State in reality controls a non-State actor or is a respondent State expected to prove the contrary? In the domestic law system, where there is a central government, similar problems could be solved by a strong evidence finding mechanism. However, a dilemma exists at the international level due to the lack of a central government: if we impose the burden of proof on a claimant, a respondent State can easily hide the real relationship between that State and its State-owned corporations; if we impose the burden of proof on a respondent State, it is also difficult to find a threshold for the respondent State to discharge the burden of proof. Obviously, neither approach is perfect.

One may argue that there is nothing wrong with applying the 'effective control' or 'overall control' criterion to inter-State disputes. This is partly acceptable, because States are equal or at least considered to be equal in international society.[272] Theoretically, a claimant State has the capacity to prove whether a respondent State controls a non-State actor or not. But the case is different for human rights violations: how could an individual prove that a State controls a State-owned corporation in reality? As majority government ownership indicates the ability to control a State-owned corporation and a government can always deny *de facto* control on the pretext that ownership and managerial authority are separate, a special rule of attribution is needed in human rights law. This is the lesson we can learn from the WTO and the ECtHR cases. The special rule of attribution in the field of human rights law can be designed as follows.

The conduct of a State-owned corporation should be directly attributed to the State which has the majority ownership in the corporation. This special rule is more reasonable for human rights issues than the criterion of the ICJ in the *Nicaragua*

[271] United Nations, Yearbook of the International Law Commission 2001, Volume II, Part Two. A/CN.4/SER.A/2001/Add.1 (Part 2), p.47.
[272] The Charter of the United Nations, Article 2.

and *Genocide*, which may continue to govern inter-State disputes.[273] Perhaps a more radical solution would be to consider a State-owned corporation in which a State has the majority ownership to be a State organ of that State (Article 4 of the ILC Articles). This radical solution may impose a high degree of responsibility on State in all branches of international law. This book only argues for a special rule on attribution in the field of human rights law, as individuals are considerably in a disadvantageous position when they have to prove the real relationship between a State and its State-owned corporation. Some research has indicated that flexibility for the consideration of attribution issues with regard to State-owned corporations is necessary in other field of international law.[274] In sum, the conduct of a State-owned corporation should be directly attributed to the Owner State and therefore entails State obligation to respect human rights.

6. A Case Study of Chinese State-owned Corporations

The case of Chinese State-owned corporations could further exemplify the difficulty for a third party to prove the real relationship between a State and its State-owned corporations. This part provides an example of the failure of the *Nicaragua* or *Tadić* criterion to address the attribution issue concerning State-owned corporations. It then explains how the special rule designed by this chapter should be applied to Chinese State-owned Corporations.

6.1. From State-run Enterprises to State-owned Corporations: A Historical Perspective

It is arguable that all Chinese State-owned corporations should be considered as the State organ in a certain period of the People's Republic of China (the PRC). This

[273] ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, para.109. ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007. para.400.
[274] Paul Blyschak, *State-owned enterprises and international investment treaties: When are state-owned entities and their investments protected*, 6 JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 1(2010). p.48.

period refers to the history of the PRC from 1949 to 1993, when State-owned enterprises (国有企业) were called State-run enterprises (国营企业). This period nearly overlaps with the period of the planned economy in China. At that time, State-run enterprises prevailed in China's economy and they were directly managed by the government.[275] Their status as State organ can be inferred from both law and practice at that time.

The PRC has had four successive constitutions, the 1954 Constitution, the 1975 Constitution, the 1978 Constitution, and the 1982 Constitution respectively. The 1982 Constitution (the current Constitution) has been amended four times (in 1988, 1993, 1999, and 2004).[276] The 1993 amendment has witnessed a transformation of the status of State-run enterprises. Before 1993, the term used in the Constitution was 'State-run enterprise' (国营企业), which was revised as 'State-owned enterprise' (国有企业) in the 1993 amendment.[277] The 1993 amendment has conferred more decision-making power upon State-owned enterprise. The provision that 'State-run enterprises have decision-making power with regard to operation and management within the limits prescribed by law, on condition that they are subject to the unified leadership of the State and that they fulfil all their obligations under the State plan' was revised as 'State-owned enterprises have decision-making power with regard to operation and management within the limits prescribed by law'.[278] It indicates that, before 1993, State-run enterprises had to implement a State plan together with other State organs.

There was no legislation on State-run enterprises until the regulation (《国营工业企业暂行条例》, valid from 1983 to 1988) issued by the State council in

[275] 张卓元: 《中国国有企业改革 30 年回顾与展望》, 北京: 人民出版社, 2008, pp.21-31. (Zhuoyuan Zhang, 30 Years of China's Reforms on State-owned Enterprises: Looking Backward and Forward, Beijing: People's Press, 2008, pp.21-31.)
[276] The texts of different versions are available at: http://www.pkulaw.cn/ (last accessed 10-04-2014).
[277] The Amendment to the Constitution of the People's Republic of China (1993), available at: http://en.pkulaw.cn/display.aspx?cgid=6183&lib=law (last accessed 8-9-2016), Article 8.
[278] Id, Article 8.

1983.[279] And it was not until 1988 that China's National Congress promulgated the law on State-run enterprises (《中华人民共和国全民所有制工业企业法》, revised in 2009).[280] According to the 1983 regulation and the 1988 legislation, State-run enterprises were wholly owned by the State. Before 1993, private actors could not become shareholders of a State-run enterprise.[281] According to the 1988 legislation, a State-run enterprise should fulfill the mandatory plans of the State.[282] (This article was deleted in 2009). Therefore, State-run enterprises did not enjoy much independence from the State and they should be considered as the State organ according to the *Genocide* criterion.[283]

Table 1: A Historical Perspective of Chinese State-owned Enterprises

Year	**Stage of Enterprises**	**Relationship to the government**
1949-1956	State-run Enterprises	Established by the government
1956-1978	State-run Enterprises	Wholly owned by the State and directly managed by the government
1978-1993	State-run Enterprises	Wholly owned by the State and directly managed by the government; Some decision-making authority given to State-run Enterprises
1993-1997	State-owned Enterprises	Mixed ownership permitted in practice
1997-	State-owned Corporations (the most popular form of State-owned Enterprises)	The State as a shareholder; the separation of ownership and managerial authority

[279] 《国营工业企业暂行条例》(Provisional Regulation on State-run Enterprises, 1983, invalid now).
[280] 《中华人民共和国全民所有制工业企业法》(The Law on Industrial Enterprises Owned by the Whole People, issued in 1988, revised in 2009).
[281] In 1997, the concept of mixed ownership of State-owned corporations was put forward for the first time in the 15th National Congress of the Chinese Communist Party. Between 1993 and 1997, the reform towards mixed ownership of State-owned corporations had already started in practice. See the report of Jiang Zemin in the 15th National Congress of the Chinese Communist Party, available at: http://news.xinhuanet.com/zhengfu/2004-04/29/content_1447509.htm (last accessed 8-9-2016).
[282] Supra note 280, Article 35.
[283] Supra note 185.

In practice, the officials of State-run enterprises who were appointed by the government were treated in the same way as the officials of other State organs and they were both called *'Ganbu'* (干部) of the State.[284] Every State-run enterprise was given an administrative rank, ranging from the highest, *'Ministry'* (部), to the lowest, *'Ke'* (科).[285] That rank in turn determined the administrative rank of its officials. It was quite normal that officials were transferred between State-run enterprises and other State organs. For example, Mr. JIANG Zemin, the former president of the PRC, had extensive working experience in a big State-run enterprise called the First Automobile Work Factory (it is called 'China FAW Group Corporation' now) before he was directly appointed as an official in the Ministry of Machinery Industry in 1962, a State organ at that time.[286] In the old Criminal Law Code (valid from 1979 to 1997), the officials of State-run enterprises were classified in the same group as those of ordinary State organs for the crime of dereliction of duty.[287] The above facts further indicate that Chinese State-run enterprises should be considered as State organ.

Things have changed since the corporatization reform of State-owned enterprises around the year 1997. At present, most State-owned enterprises have been reorganized in the form of corporation. A mixed ownership (public and private) of a State-owned corporation is allowed now. The current legislation provides that State-owned corporations should operate 'in line with the principle of the separation

[284] 'Ganbu' (干部) is a Chinese word imported from Japanese and its counterpart in western culture is 'civil servant'. But 'Ganbu' in Chinese includes officials of State-run enterprises. It was not until 2005 that the term 'Ganbu' was replaced by the term 'civil servant' according to the civil servant law.

[285] 沈祖颜: 《国营企业与行政级别脱钩势在必行》,《特区理论与实践》1992 年第 1 期, 第 16 页. (Zuyan Shen, It Is Necessary to Cancel the Administrative Rank of State-run Enterprises, 1992.)

[286] 新华网:《十六大授权发布:江泽民同志简历》, 2002, available at: http://news.xinhuanet.com/newscenter/2002-11/16/content_631553.htm (last accessed 12-3-2014). (XinhuaNet, the CV of Mr. JIANG Zemin, 2002.)

[287] 《中华人民共和国刑法》(1979). (Criminal Law Code of the People's Republic of China, 1979, Article 187).

of ownership and managerial authority'.[288] The State acts as a shareholder of a State-owned corporation. The officials of State-owned corporations have not been considered as governmental officials since 2005.[289] They are no longer classified as officials of State organs for the crime of dereliction of duty under the 1997 Criminal Law Code.[290] The Chinese government has declared that the purpose of the reform on State-owned enterprises is to separate them from the government.[291] There is no clear evidence that Chinese State-owned corporations are State organ since 1997. Are they entities (under State control) under the meaning of Article 8 of the ILC Articles? According to the *Nicaragua* or *Tadić* criterion, or the jurisprudence of the WTO Appellate Body, evidence more than ownership is needed to prove that China in fact controls a State-owned corporation. The next part shows that it is almost impossible for a third party to prove the real relationship between the Chinese government and its State-owned corporations.

6.2. China's Current Law and Policy on State-owned Corporations

6.2.1. Four Types of State-Invested Enterprises

The law on the State-owned assets of enterprises (《中华人民共和国企业国有资产法》) governs all State-invested enterprises.[292] According to this law, a State-invested enterprise refers to a wholly State-owned enterprise with the State being the sole investor or a company in which the State has a stake, whether controlling or non-

[288] 《中华人民共和国企业国有资产法》(The Law of the People's Republic of China on the State-Owned Assets of Enterprises, issued in 2008, Article 6).
[289] 《中华人民共和国公务员法》(2005). (Civil Servant Law of the People's Republic of China, 2005, Article 2).
[290] 《中华人民共和国刑法》(1997). (Criminal Law Code of the People's Republic of China, 1997, Article 397).
[291] 中共中央、国务院:《中共中央、国务院关于深化国有企业改革的指导意见》, 2015. (The Central Committee of the Chinese Communist Party and the State Council, The Guiding Principles on Further Reforms on State-owned Corporations, 2015.)
[292] 《中华人民共和国企业国有资产法》(The Law of the People's Republic of China on the State-Owned Assets of Enterprises, issued in 2008.)

controlling.[293] There are four types of State-invested enterprises: a wholly State-owned enterprise (国有独资企业), a wholly State-owned corporation (国有独资公司), a corporation with governmental controlling interest (国有控股公司), and a corporation in which the governmental share does not amount to a controlling interest (国有参股公司).[294] They are all governed by the law on the State-owned assets of enterprises. Among them, the first category refers to those enterprises which are registered according to the Law on Industrial Enterprises Owned by the Whole People (《中华人民共和国全民所有制工业企业法》). The last three categories are registered in accordance with the Chinese Company Law (《中华人民共和国公司法》). Usually we can tell them apart from their names: a company registered according to the Chinese Company Law should be called either a 'limited liability company' (or a 'limited company' in short) or a 'joint stock limited company'.[295] An enterprise registered according to the Law on Industrial Enterprises Owned by the Whole People is usually called a 'company' (sometimes even called a 'bureau', for example the 'China Metallurgical Geology Bureau', in Chinese: 中国冶金地质总局) in practice.

Table 2: Four Types of State-owned Corporations

Type of Enterprises		**Characteristics**	**Special Legislation**
State-owned corporation in the narrow sense	A wholly State-owned enterprise (国有独资企业 or 全民所有制企业)	a legal person; wholly owned by the State; registered according to the Law on Industrial Enterprises Owned by the Whole People	the Law on Industrial Enterprises Owned by the Whole People (《中华人民共和国全民所有制工业企业法》)

[293] Id, Article 5.
[294] Id.
[295] 《中华人民共和国公司法》(The Company Law of the People's Republic of China, amended in 2013, Article 8.)

	A wholly State-owned corporation (国有独资公司)	a legal person; wholly owned by the State; registered according to the Chinese corporation law	Article 64 to Article 70 of the Chinese corporation law
	A corporation with governmental controlling interest (国有控股公司)	a legal person; the governmental share (including through other State-owned corporations) amounts to controlling interest; registered according to the Chinese corporation law	none
State-owned corporation in the wide sense	A corporation in which the governmental share does not amount to controlling interest (国有参股公司)	a legal person; the governmental share (including through other State-owned corporations) does not amount to controlling interest; registered according to the Chinese corporation law	none

A wholly State-owned enterprise (国有独资企业) is registered in accordance with and specifically governed by the Law on Industrial Enterprises Owned by the Whole People (《中华人民共和国全民所有制工业企业法》, issued in 1988, revised in 2009).[296] The government is the direct shareholder of a wholly State-owned enterprise. According to this law, wholly State-owned enterprises are closely supervised by the State and they have a very close relationship with the government. For example, Article 56 (under the chapter entitled the relationship between enterprises and the

[296] 《中华人民共和国全民所有制工业企业法》(The Law on Industrial Enterprises Owned by the Whole People, issued in 1988, revised in 2009, Article 2.)

government) of that law provides that the State should 'guide the developmental plan of those enterprises', 'provide service and information for their business', and 'coordinate the relationship between those enterprises and other bodies'.[297] It is arguable that even in accordance with the *Tadić* or *Genocide* criterion, all 'wholly State-owned enterprises' are controlled by the State and therefore the conduct of these enterprises should be attributed to the Chinese government. However, the subsidiaries of wholly State-owned enterprises cannot be registered in accordance with the Law on Industrial Enterprises Owned by the Whole People, because the government is not their direct shareholder. The subsidiaries of wholly State-owned enterprises remain governed by the law on the State-owned assets of enterprises,[298] but whether they are controlled by the State is less sure according to the *Tadić* or *Genocide* criterion.

A wholly State-owned corporation (国有独资公司) is registered according to the Chinese Company Law. According to Article 64 of that law, a wholly State-owned corporation refers to a limited liability company invested in wholly by the State.[299] Article 66 states that: 'The State-owned assets supervision and administration institution (governmental organ) shall exercise the functions of the shareholders' meeting.'[300] The State acts as the shareholder of a wholly State-owned corporation. A wholly State-owned corporation is governed by the company law, and this law has not provided such a special relationship between corporation and the government as is comparable to the wholly State-owned enterprise.[301] It is hard to prove that a wholly State-owned corporation is controlled by the government according to the *Tadić* or *Genocide* criterion.

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[297] 《中华人民共和国全民所有制工业企业法》(The Law on Industrial Enterprises Owned by the Whole People, issued in 1988, revised in 2009.)
[298] Supra note 292.
[299] 《中华人民共和国公司法》(The Company Law of the People's Republic of China, amended in 2013, Article 64.)
[300] Id, Article 66.
[301] Supra note 297.

In business practice, a wholly State-owned enterprise or a wholly State-owned corporation often establishes subsidiaries which are registered in accordance with the Chinese Company Law. Those subsidiaries can further establish new subsidiaries. The law on the State-owned assets of enterprises remains applicable to them.[302] But this law does not specify which type of State-owned corporations they belong to. It is arguable that those subsidiaries on different levels at least belong to the third or the fourth type of State-owned corporations, depending on whether the governmental capital has the controlling interest in them.

There is no special legislation on a corporation with governmental controlling interest (国有控股公司) or a corporation in which the governmental share does not amount to a controlling interest (国有参股公司). They are governed by the general law: the law on the State-owned assets of enterprises (《中华人民共和国企业国有资产法》) and the Chinese Company Law (《公司法》). According to Article 6 of the first law, the government shall act as a shareholder, based on the principles of separation of government bodies and enterprises, separation of governmental authority and the role of shareholder, and non-intervention in the legitimate and independent operations of enterprises.[303] The legislation could not indicate that China controls the last three types of State-owned corporations according to the *Tadić* or *Genocide* criterion.

6.2.2. China's Reforms on State-owned Corporations and the Relationship between the State and Enterprises

China has commenced reforms on State-owned corporations since its 'reform and opening-up' policy in 1978 and the reforms on State-owned corporations remain in progress.[304] China's reforms have two main strategies: enhancing the supervision of

[302] 《中华人民共和国企业国有资产法》(The Law of the People's Republic of China on the State-Owned Assets of Enterprises, issued in 2008, Article 2.)
[303] Id, Article 6.
[304] 中央政府门户网站: 国有企业改革路线图. (The Website of the Chinese Government, The Road Map for Reforms on State-owned Corporations, 13-09-2015, available at: http://www.gov.cn/zhuanti/2015-09/13/content_2931514.htm (last accessed 16-05-2016).)

big enterprises and reducing and eliminating the supervision of small enterprises; and giving enterprises decision-making authority.

The first strategy is enhancing the supervision of big enterprises and reducing and eliminating the supervision of small enterprises.[305] China had more than 144,700 non-financial State-owned corporations (in the narrow sense) until 2012.[306] They are either owned by the State Council or by local governments. The State-owned Assets Supervision and Administration Commission of the State Council (the SASAC) directly supervises only 104 State-owned corporations which China considers as the most important ones.[307] The 104 State-owned corporations are either wholly State-owned enterprises (81) or wholly State-owned corporations (23). Most Chinese overseas investments made by State-owned corporations are from the subsidiaries (on different levels) of these 104 corporations. This chapter has argued that 'wholly State-owned enterprises' are controlled by the State even according to the *Tadić* or *Genocide* criterion, but it is less sure for their subsidiaries.[308]

The second strategy of China's reforms on State-owned corporations is the separation of ownership and managerial authority.[309] China has declared that State-owned corporations enjoy sufficient decision-making authority.[310] The Chinese government maintains that the purpose of the supervision of State-owned corporations is to prevent the loss of State assets rather than to interfere with their business.[311]

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[305] 国务院:《国务院关于国有企业改革与发展工作情况的报告》, 2012. (The State Council, the Report on the Reforms and Development of State-owned Corporations, 2012.)
[306] Id.
[307] See the list of State-owned corporations supervised by the SASAC on its website, available at: http://www.sasac.gov.cn/n86114/n86137/index.html (last accessed 16-9-2016).
[308] 6.2.1.
[309] 国务院:《国务院关于国有企业改革与发展工作情况的报告》, 2012. (The State Council, the Report on the Reforms and Development of State-owned Corporations, 2012.)
[310] Id.
[311] 中共中央、国务院:《中共中央、国务院关于深化国有企业改革的指导意见》, 2015. (The Central Committee of the Chinese Communist Party and the State Council, The Guiding Principles on Further Reforms on State-owned Corporations, 2015.)

Some Chinese State-owned corporations have claimed State immunity in US courts.[312] However, the Chinese government has not made a general statement on its stance on State immunity for State-owned corporations. China Foreign Affairs Ministry spokesman Lu Kang was requested to make comments on this phenomenon.[313] His response is very vague. He has stated that: 'All enterprises, including State-owned ones, are entitled to protect their lawful rights and interests in accordance with the law of the country where the court is situated. And secondly, the Chinese government has been asking its overseas enterprises to respect and abide by local laws.'[314] The last sentence of his remarks indicates that the Chinese central government has not claimed State immunity for State-owned corporations.

Although China proclaims that it does not interfere with the business of State-owned corporations, it has the ability to control them. First of all, the governmental majority ownership denotes its ability to formulate corporate strategy by voting. Second, China always emphasizes the leadership of the Chinese Communist Party in State-owned corporations.[315] In reality, almost every leader of State-owned corporations is a member of the Chinese Communist Party. They are subject to the discipline of the Chinese Communist Party. The Chinese Communist Party has established its organizations in different levels of State-owned corporations, including in subsidiaries registered in a host State.[316] On the website of the SASAC, there are a lot of news reports concerning the activities of the Communist Party's

[312] Matthew Miller and Michael Martina, Chinese State Entities Argue They Have 'Sovereign Immunity' in U.S. Courts, Reuters World News, 11 May 2016.
[313] The Chinese Ministry of Foreign Affairs, Foreign Ministry Spokesperson Lu Kang's Regular Press Conference on 11 May 2016, available at: http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1362394.shtml (last accessed 5-4-2017).
[314] Id.
[315] Supra note 311.
[316] 人民网:《海外党建: 一带一路建设的强大动力》, 2016 年 08 月 25 日. (The People Net, Chinese Overseas Communist Parties: the strong power of One Belt, One Road, 25-08-2016, available at: http://dangjian.people.com.cn/n1/2016/0825/c117092-28666127.html (last accessed 30-08-2016).)

organizations in overseas State-owned corporations.[317] The conduct of the Chinese Communist Party, the ruling party according to China's Constitution, is arguably attributed to China according to Article 4 of the ILC Articles. Although the overseas organizations of the Chinese Communist Party in its State-owned corporations do not exercise any governmental functions, they are arguably controlled by the Chinese Communist Party and therefore their conduct is attributed to China. However, China could argue that the Communist Party's overseas organizations do not interfere with the business of State-owned corporations and that they are just fora for their members to practice their beliefs in Marxism. Therefore, despite the ability to control its overseas State-owned corporations, China could always deny the *de facto* control over these State-owned corporations in accordance with the *Tadić* or *Genocide* criterion.

The above facts indicate that China has the ability to control its overseas State-owned corporations and it can always deny *de facto* control. It further highlights the necessity of the special rule on attribution issue concerning State-owned corporations. This chapter has argued that the conduct of a State-owned corporation should be directly attributed to the State which has the majority ownership in the corporation.[318] It is submitted that the conduct of Chinese State-owned corporations in a host State should be attributed to China, if China has majority ownership in those companies including through different levels of capital control. The following charts provide an example of how Chinese State-owned corporations establish subsidiaries on different levels.

Chart 1: The Ownership Structure of a Chinese State-owned Corporation Group[319]

[317] Using search keywords '海外' (overseas) and '党组织' (Communist Party's organization), the author has found more than 100 pieces of news. Available at: http://www.sasac.gov.cn/index.html (last accessed 19-09-2016).
[318] The above section 5.3.
[319] Data from the public database for all Chinese companies, available at: http://gsxt.saic.gov.cn/ (last accessed 20-9-2016).

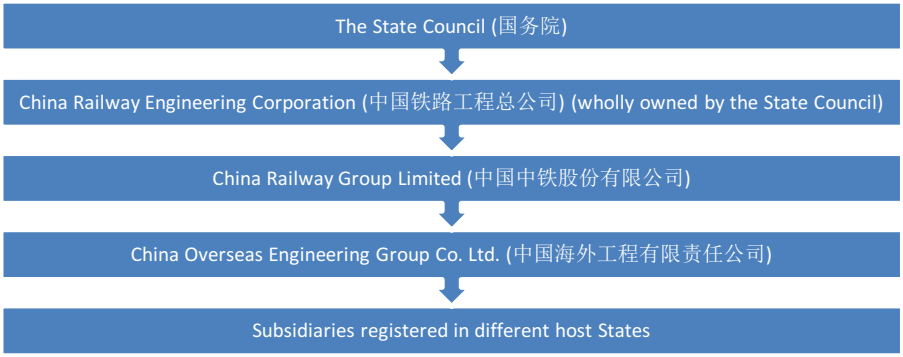
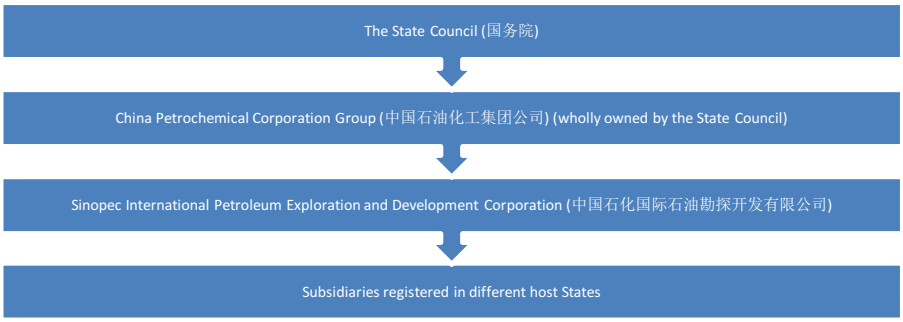


Chart 2: The Ownership Structure of a Chinese State-owned Corporation Group[320]



7. Conclusion

The home State of an MNC might be responsible for its actions or omissions to different extents:

(1) A home State may incur responsibility for its own contribution to human rights abuses abroad, for example by providing subsidies to a corporation that engages in human rights abuses.

[320] Id.

(2) A home State might be responsible for failure to regulate or for inadequate regulation of a corporation, if the home State is obliged to take regulatory measures.

(3) A home State might be directly responsible for corporate human rights abuses (corporate conduct) which can be attributed to it.

The traditional public/private dichotomy in international law has led to an ineffective regulation over private actors.[321] The problem caused by private abusers could be addressed either by attributing more to States under secondary rules or by developing positive obligations in primary rules.[322] This book acknowledges that primary rules and secondary rules are interrelated in relation to human rights violations. It addresses the problem of the human rights damage caused by a State-owned corporation by developing secondary rules on attribution issues, because a State-owned corporation has a close link to the State as owner. The problem of the human rights damage caused by an ordinary company will be tackled under the framework of primary rules.[323]

The ILC Articles have provided a legal framework for the attribution issues. However, these articles have not settled the attribution issue concerning State-owned corporations. The *Nicaragua, Tadić* or *Genocide* criterion could not solve this problem either, because they have overlooked situations where a State has the ability to control an entity.[324] The WTO case law has indicated that it is difficult for a third party to prove the real relationship between a State-owned corporation and the State.[325] The ECtHR has adopted a flexible approach to the attribution issue: on one hand, it is inclined to presume the attribution of the conduct of a State-owned corporation to the State; on the other hand, it leaves space for States to overthrow that presumption.[326] The flexible approach to the attribution issue relies on the judicial discretion of the ECtHR. This approach may not be appropriate in the

[321] Supra note 157.
[322] Supra note 162.
[323] The above section 2.3.
[324] The above section 4.3.4.
[325] The above section 5.2.
[326] The above section 5.1.

context of the core UN human rights treaties, the judicial enforcement of which is not as strong as the ECHR.

A special rule of attribution is needed in the discourse of universal human rights treaties. The special rule can be designed as follows: 'The conduct of a State-owned corporation should be directly attributed to the State which has the majority ownership in the corporation.' [327] China's practice concerning State-owned corporations has further highlighted the need for the special rule on the attribution issue.[328] In terms of ordinary corporations other than State-owned corporations, their conduct generally cannot be attributed to the State where they are registered or based. What can be attributed to the home State of an MNC is the non-regulation (or inadequate regulation) by its State organ when such a corporation has abused human rights in a host State.

[327] The above section 5.3.
[328] The above section 6.2.

Chapter 3 The Scope of State Obligations under the ICCPR

1. Introduction

MNCs may adversely affect civil and political rights (such as the right to life, the right to be free from torture) of individuals in a host State. Do civil and political rights give rise to home State obligations in relation to MNCs? This chapter explores the scope of State obligations under the ICCPR on the basis of a literature review of academic debates on this topic and the practice of the HRC, the ICJ, and the ECtHR. Regional and general international human rights institutions share a lot of similarities and this makes cross-fertilization possible.[329] The analysis of the scope of State obligations under the ICCPR will benefit from the experience and lessons learned from the ECtHR case law.

It is well known that States have human rights obligations towards individuals within their own territory. In the field of civil and political rights, a recently developed notion of extraterritorial obligation (ETO) deserves attention, which focuses on State obligation towards individuals beyond its territory.[330] As far as this book is concerned, several questions arise: What does Article 2 of the ICCPR indicate? What is the function of the phrase 'all individuals within its territory and

[329] Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 749(2008). p.768. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARVARD INTERNATIONAL LAW JOURNAL 191(2003). p.192. Antoine Buyse, *Echoes of Strasbourg in Geneva*, 59 JAPANESE YEARBOOK OF INTERNATIONAL LAW 81(2016). p.81. Ulf Linderfalk, *Cross-fertilisation in International Law*, 84 NORDIC JOURNAL OF INTERNATIONAL LAW 428(2015). p.455.

[330] Dominic McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights*, *in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno Kamminga eds., 2004). p.43.

subject to its jurisdiction' under Article 2(1) of the ICCPR? Can the ETO approach in the area of civil and political rights lend support to home State obligations in general? Are ETO approaches developed enough to understand the scope of State obligations under the ICCPR? Could home State obligations be based on another approach rather than ETO?

The ETO approach deals with situations in which States have obligations towards individuals beyond their borders. The early ETO approach starts from the presumption that State obligations in the area of civil and political rights are restricted by the jurisdiction clause (or the 'territory and jurisdiction clause' in the ICCPR) in certain human rights treaty provisions.[331] The so-called jurisdiction clause exists in several human rights treaties, for example, Article 6 of the ICERD, Article 2 of the CRC and Article 1 of the ECHR. The ICCPR has even adopted the expression of 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant' in the article concerning general obligations of State parties.[332]

It is more onerous to prove extraterritorial obligation on the basis of a territory and jurisdiction clause than on the basis of a jurisdiction clause. This chapter first reviews the literature on ETO derived from the jurisdiction clause in order to learn lessons from it. Logically there are two kinds of relationship between a State and individuals beyond its territory. First, there are situations that individuals are beyond the territory of a State but within its jurisdiction. Second, it is also possible that individuals are not only beyond the territory of a State but also beyond its jurisdiction. It is easy to judge whether an individual is in the territory of a State, but it is difficult to answer whether an individual is within the jurisdiction of a State. As far as home State obligation is concerned, two issues are of great importance:

[331] Dominic McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights*, *in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno Kamminga eds., 2004).p.43. Rick Lawson, *Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights*, *in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno Kamminga eds., 2004).p.83.
[332] The ICCPR, Article 2(1).

the first issue is whether individual victims of an MNC are within the jurisdiction of the home State of the MNC; the other issue is whether home State obligations remain at issue when the answer to the first question is no.

In public international law, the word 'jurisdiction' has been used for a long time to indicate the legal competence of a State to make, apply, and enforce rules of conduct upon persons.[333] It concerns a State's right to regulate conduct or the consequences of events.[334] However, 'jurisdiction' is used in a totally different context in human rights treaties. In human rights treaties, the term 'jurisdiction' is connected with the persons whose rights a State shall ensure.

Some scholars have put forward a gradual approach to the notion of jurisdiction in human rights law.[335] According to this approach, the meaning of jurisdiction could be adjusted so as to cater to different levels of State obligations. For positive obligations, this approach argues that, if a State can lawfully act (for example to protect certain individuals), then the relevant individuals are within its jurisdiction for the purpose of invoking such a positive obligation.[336] This approach can support home State obligations to regulate ordinary corporations, because a home State is at least in a position to regulate the parent company of an MNC based in its territory. However, this approach may raise some objections: it is tantamount to saying that a State has a positive obligation as long as it is able to do that.

As is explained in Section 2 of this chapter, the latest ETO approach has challenged the presumption of the early ETO approach. Some scholars have argued that the jurisdiction clause should only restrict the scope of positive obligations (State obligations to take action) rather than negative obligations (State obligations to

[333] Vaughan Lowe & Christopher Staker, *Jurisdiction*, *in* INTERNATIONAL LAW (Malcolm Evans ed. 2010). p.313.
[334] Id.
[335] Lawson, Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights. 2004.p.120. King, HUMAN RIGHTS LAW REVIEW, (2009). p.556.
[336] Id.

refrain from interfering with the enjoyment of rights).[337] According to the latest ETO approach, a State has a negative obligation towards everybody, everywhere.[338] Home State obligations could be based on such a negative obligation: first, a home State should not deliberately assist in human rights abuses abroad, for example, by providing subsidies to corporations that abuse human rights abroad; second, a home State should ensure that the corporation whose conduct can be attributed to it does not abuse human rights abroad. Furthermore, under the latest ETO approach, there is a trend that some procedural positive obligations (which require the provision of sufficient remedies for violations of rights) are also not subject to the jurisdiction clause.[339] This chapter explores the relevance of such a trend for home State obligations.

This chapter puts forward a theoretical model for interpreting Article 2 of the ICCPR. This model will be further justified by means of the treaty interpretation method.[340] Based on the lessons learned from the ECtHR case law, this chapter argues that the territory and jurisdiction clause under Article 2 of the ICCPR itself should be read in conjunction with the word 'ensure' in the same provision and that negative obligations and procedural positive obligations, by their very nature, are not circumscribed by the territory and jurisdiction clause.

2. The Nature of the Jurisdiction Clause in Scholarly Writings

The literature on ETO can be dated back to at least as early as the 1990s.[341] But it was not until the *Banković* case of the European Court of Human Rights that the topic of ETO became a hot debate among scholars.[342] Most ETO approaches have been built on the interpretation of the jurisdiction clause. It seems that many

[337] Roxstrom, et al., supra note 109, p.72. Milanovic, Supra note 57, p.209.
[338] Milanovic, Id, p.209.
[339] Id, p.216.
[340] For ease of reading, this part will be discussed in the next chapter.
[341] Meron, Supra note 61, pp.78-82.
[342] The European Court of Human Rights, Banković and Others v. Belgium and Others, Grand Chamber, Decision as to the Admissibility of Application, 12 December 2001.

scholars have taken it for granted that the jurisdiction clause (or the territory and jurisdiction clause in the ICCPR) is equivalent to the necessary and sufficient condition for the whole range of State obligations in human rights treaties. For example, Dominic McGoldrick stated in the introduction of an article that: '[I]f the individuals are not 'within the territory and subject to the jurisdiction' of a State party, then that State cannot be responsible for violations of the Covenant. That is because it does not owe any obligations to those individuals under the Covenant…'[343] Ralph Wilde has asserted that: '[A] nexus to the State—termed 'jurisdiction'—has to be established before the State's obligations are in play.'[344] Most scholars are inclined to discuss extraterritorial obligations simply from the notion of jurisdiction.[345]

Some scholars also started from the jurisdiction clause, but in the face of the absurd result in the *Banković* case they have put forward a gradual approach to the concept of jurisdiction.[346] For instance, Rick Lawson considered that, for an individual to be able to rely on the European Convention on Human Rights, he must demonstrate that he was within the jurisdiction of the State concerned at the relevant time.[347] He further proposed a gradual approach to the notion of jurisdiction the meaning of which could be adjusted so as to cater to different types of State obligations.[348] A certain human right entails different types of State obligations and therefore the gradual approach of jurisdiction gives a different meaning to the term 'jurisdiction' depending on which obligation is at stake. Hugh King has argued that 'jurisdiction'

[343] McGoldrick, Extraterritorial Application of the International Covenant on Civil and Political Rights. 2004. p.43.
[344] Ralph Wilde, *Human Rights beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties*, 12 CHINESE JOURNAL OF INTERNATIONAL LAW 639(2013).para.33.
[345] GONDEK, supra note 66, pp.11-13; Michael Duttwiler, *Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights*, 30 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 137(2012). pp.138-139.
[346] Michał Gondek, *Extraterritorial application of the European Convention on Human Rights: territorial focus in the age of globalization?*, 52 NETHERLANDS INTERNATIONAL LAW REVIEW 349(2005). pp.385-386. King, HUMAN RIGHTS LAW REVIEW, (2009). p.556.
[347] Lawson, Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights. 2004. p.83.
[348] Id, p.120.

is not an indivisible concept and that the meaning of jurisdiction could be adjusted according to the tripartite typology of State obligations (the obligation to respect, to protect and to fulfill).[349] The key point of the gradual approach is a case-by-case analysis of State jurisdiction depending on which obligation is challenged in a case.

The gradual approach holds that if a State affects a person actively through its action, then the person is within its jurisdiction for the purpose of invoking State negative obligations.[350] For the positive obligations, this approach seems to argue that if a State is expected to act and it can lawfully act then the relevant individuals are within its jurisdiction for the purpose of invoking such a positive obligation.[351] According to the gradual approach to jurisdiction, a home State is arguably obliged to regulate the extraterritorial conduct of an MNC, because it is at least in a position to regulate the parent company of an MNC based in its territory.

Some other scholars, however, greatly doubt the gradual approach to the notion of jurisdiction.[352] They think that the gradual approach is problematic because, in a given situation, a State either has or does not have jurisdiction, whatever the criterion of jurisdiction is, over the individual concerned. According to them, jurisdiction is an either-or question in a given case. As is pointed out by Samantha Besson, jurisdiction is an all-or-nothing matter and not a matter of degree: either one is giving reasons for action and requiring compliance, or one is not.[353] Besson has argued that, just like with the term sovereignty, which is an all-or-nothing question for a certain State towards a territory, jurisdiction cannot therefore be split into levels and acquired gradually.[354]

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[349] Hugh King, *The Extraterritorial Human Rights Obligations of States*, 9 HUMAN RIGHTS LAW REVIEW 521(2009).p.556.
[350] Id.
[351] Id.
[352] Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, 25 LEIDEN JOURNAL OF INTERNATIONAL LAW 857(2012). p.878. Milanovic, Supra note 57, p.210.
[353] Besson, Id, p.878.
[354] Id.

The gradual approach to the notion of jurisdiction is similar to the idea of the ECtHR that ECHR rights or obligations can be 'divided and tailored'. In the *Banković* case, the ECtHR denied the idea that convention rights or obligations can be divided and tailored.[355] It caused a result that a State either has all levels of obligations in a given case or does not have any obligation at all. At this point, the *Banković* decision has been criticized dramatically.[356] In the *Al-Skeini* case, the ECtHR changed its mind to hold that convention rights or obligations can be divided and tailored.[357] In human rights debates, it has been gradually accepted that every human right entails different types of State obligations.[358] Different types of State obligations can be invoked separately. That is why the ECtHR has confirmed that convention rights or obligations can be divided and tailored since the above *Al-Skeini* case.

Now that a human right entails different types of State obligations, can we say that some kinds of obligations are not subject to the jurisdiction clause at all? The American Convention on Human Rights (the ACHR) is a paradigm that only its positive obligations are subject to the jurisdiction clause. Article 1(1) of the ACHR states that: 'The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms…' It indicates that a negative obligation is not restricted by the jurisdiction clause and that a State should respect human rights anywhere and to anybody. Article 1 of the ECHR does not differentiate between negative and positive obligations, but it expresses all State obligations by using the word 'secure'. In Article 2(1) of the ICCPR, the territory and jurisdiction clause seems to be connected with both negative and positive obligations. A question then arises: Can we say that negative obligations in all human rights treaties should not be conditioned by the jurisdiction (or the territory

[355] The European Court of Human Rights, Banković and Others v. Belgium and Others, Grand Chamber, Decision as to the Admissibility of Application, 12 December 2001, para.75.
[356] Roxstrom, et al., supra note 109, pp.135-136.
[357] The European Court of Human Rights, Al-Skeini and Others v. the United Kingdom, Grand Chamber, Judgment of 7 July 2011, para.137.
[358] KÄLIN & KÜNZLI, The Law of International Human Rights Protection. 2009. pp.96-97.

and jurisdiction) clause? A further question could arise: Are all positive obligations subject to the jurisdiction clause?

A few scholars have questioned the presumption that the jurisdiction clause is the precondition for the whole range of State obligations. It has been argued, by Erik Roxstrom, Mark Gibney and Terje Einarsen, that the expression 'persons within their jurisdiction' relates exclusively to State positive obligations under the ECHR and that negative obligations are owed to everyone everywhere.[359] In 2011, Marko Milanovic made a distinction between negative and positive obligations and argued that negative obligations are not subject to the jurisdiction clause.[360] In contrast with the gradual approach of jurisdiction mentioned above, Milanovic proposed a simple interpretation of the term 'jurisdiction' in human rights law. In Milanovic's mode, the notion of jurisdiction in human rights treaties would be conceived of only territorially, as the *de facto* effective overall control of areas and places.[361]

Is a home State obligation for ordinary MNCs possible according to Milanovic's approach? Milanovic did not stop at the separation between negative and positive obligations. He further divided positive obligations into procedural and substantive positive obligations.[362] He claimed that the scope of substantive positive obligations is dependent on State jurisdiction.[363] He further argued, however, that a part of procedural positive obligations are not subject to the jurisdiction clause.[364] According to Milanovic, the procedural positive obligations to prevent or investigate violations by governmental agents are not restricted by the jurisdiction clause, whereas the procedural positive obligations to prevent or investigate violations by purely private actors remain subject to the jurisdiction clause.[365] In Milanovic's model, a home State obligation for ordinary MNCs is impossible: people in a host State are not within the jurisdiction of a home State according to

[359] Roxstrom, et al., supra note 109, p.72.
[360] MILANOVIC, supra note 57, p.209.
[361] Id, p.210.
[362] Id, p.215.
[363] Id, p.216.
[364] Id.
[365] Id.

Milanovic's definition of jurisdiction; as a consequence, a home State's substantive positive obligations and procedural positive obligations to prevent or investigate violations by ordinary MNCs (purely private actors) are not at issue.

Milanovic has strengthened the extraterritorial obligations to respect human rights. Home State obligations could be based on such a negative obligation: first, a home State should not deliberately assist in human rights abuses abroad, for example, by providing subsidies to corporations that abuse human rights abroad; second, a home State should ensure that the corporation whose conduct can be attributed to it does not abuse human rights abroad.[366] However, Milanovic has been criticized for his different treatment of the procedural positive obligations for violations by governmental agents on the one hand and for those by purely private actors on the other hand.[367] According to Yuval Shany, Milanovic's model exacerbates the tension between the regulated public sphere and unregulated private sphere.[368] Instead, Shany has proposed returning to a functional approach to extraterritoriality in international human rights law, which is essentially the same as the gradual approach of jurisdiction.[369] Shany has suggested that the functional approach should be limited and determined in accordance with two key notions: (1) the potential impact of the act or omission in question is direct, significant and foreseeable; or, alternatively, (2) special legal relations that put a State in a unique legal position to afford human rights protection would also justify the imposition of extraterritorial obligations.[370]

In fact, the gradual approach of jurisdiction and Milanovic's model are not fundamentally incompatible with each other. For example, the gradual approach states that anyone adversely affected by a State is within the State's jurisdiction for the purpose of invoking negative obligations. This is almost tantamount to saying

[366] Attribution issues were addressed in the last chapter.
[367] Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law*, 7 THE LAW & ETHICS OF HUMAN RIGHTS 47(2013). p.63.
[368] Id.
[369] Id, p.71.
[370] Id, p.69.

that the scope of a negative obligation is not subject to the jurisdiction clause (Milanovic's model). In terms of positive obligations, the gradual approach is more flexible than Milanovic's model. However, the gradual approach may undermine the certainty of law, because its benchmark for jurisdiction is variable. In addition, the distinction made by Milanovic between violations by State agent and by purely private actor can be explained by the lack of horizontal effect of human rights treaties, which is the reality in regards to the ICCPR.[371] This book combines the advantage of both approaches: on the one hand, it considers that the scope of negative obligations is not subject to the jurisdiction clause; on the other hand, it adopts the functional approach of jurisdiction for positive obligations while keeping an eye on legal certainty.[372] All the above academic debates have shed some light on the issue of the scope of State obligations in the area of civil and political rights. They could lend support to the notion of home State obligations to different extents. The next section explores how those scholarly approaches have been responded to in the real world, especially before the European Court of Human Rights.

3. The ECtHR Case Law on the Scope of State Obligations

The ECtHR case law on the scope of State obligations is abundant. It has developed its jurisprudence on the meaning of jurisdiction in the ECHR. Its jurisprudence may also be relevant for the interpretation of jurisdiction in other human rights treaties. In fact, the ICJ has made a cross reference to regional human rights courts including the ECtHR for the interpretation of similar issues in different human rights treaties.[373] This section explores whether the ECtHR case law could justify the notion of home State obligations over MNCs. What experience and lessons can we learn from the ECtHR case law?

[371] Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004, CCPR/C/21/Rev.1/Add.13, para.8.
[372] For the interpretation of jurisdiction, see the next chapter, at 4.2.
[373] The ICJ, Republic of Guinea v. Democratic Republic of the Congo, Judgment of 30 November 2010, para.68.

3.1. Jurisdiction as a Threshold for the Whole Range of State Obligations?

At an early stage, the ECtHR was inclined to take the approach that the jurisdiction clause is the threshold for the whole range of State obligations. In the *Banković* case, the court pointed out that: 'The essential question to be examined therefore is whether the applicants and their deceased relatives were, as a result of that extraterritorial act, capable of falling within the jurisdiction of the respondent States.'[374] The court disagreed with the applicants' opinion that positive obligations can be divided and tailored.[375] The court seemed to hold that State obligations should be applied fully or not at all. In the *Issa* case, for example, the ECtHR stated that: 'The exercise of jurisdiction is a necessary condition for a contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.'[376] It was after the *Al-Skeini* case in 2011 that the ECtHR began to support the idea that convention obligations can be divided and tailored.[377] However, the court did not elaborate on this idea and its implications. It seemed to imply, at first sight, that different types of obligations are subject to different threshold criteria.

Two points deserve mention. On one hand, the ECtHR has mainly dealt with the meaning of jurisdiction in cases concerning positive obligations. On the other hand, according to the ECtHR, the jurisdiction clause is the threshold for State positive obligations, but the benchmark of jurisdiction is variable in specific situations (depending on which type of obligation is at issue).

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[374] The European Court of Human Rights, Banković and Others v. Belgium and Others, Grand Chamber, Decision as to the Admissibility of Application, 12 December 2001, para.54.
[375] Id, para.75.
[376] The European Court of Human Rights, Issa and Others v. Turkey, Chamber, Judgment of 30 March 2005, para.66.
[377] The European Court of Human Rights, Al-Skeini and Others v. the United Kingdom, Grand Chamber, Judgment of 7 July 2011, para.137.

3.2. The Criteria of Jurisdiction Adopted by the ECtHR

In practice, the ECtHR has developed the notion of ETO by interpreting the term 'jurisdiction' under Article 1 of the ECHR. It should be noted, first of all, that in public international law the term 'jurisdiction' indicates the authority or the qualification of a State to exercise its power.[378] There are several bases for jurisdiction in international law.[379] Some authors have pointed out that jurisdiction in public international law can be divided into legislative jurisdiction and enforcement jurisdiction.[380] A State could exercise legislative jurisdiction extraterritorially but the State would not have the jurisdiction to enforce its legislation in other States without the consent of the latter.[381]

The concept of jurisdiction in human rights law, according to some scholars, serves a different purpose, which is usually considered as the threshold for triggering State obligations.[382] That is why some scholars suggest a different interpretation of jurisdiction in human rights law from that in public international law.[383] The ECtHR has proclaimed its interpretation on the notion of jurisdiction under the ECHR. According to the jurisprudence of the ECtHR, a State's jurisdiction is primarily territorial and only in exceptional cases can State acts outside its territory

[378] Michael Akehurst, *Jurisdiction in International Law,* 46 BRITISH YEAR BOOK OF INTERNATIONAL LAW 145(1974). p.145.
[379] Bernard H Oxman, Jurisdiction of States, Max Planck Encyclopedia of Public International Law, November 2007.
[380] Maarten den Heijer & Rick Lawson, *Extraterritorial Human Rights and the Concept of 'Jurisdiction'*, *in* GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW (Malcolm Langford, et al. eds., 2013). p.156.
[381] Id, pp.156-157.
[382] For example, Maarten den Heijer and Rick Lawson asserted that: '[T]he function of jurisdiction in human rights treaties must not be automatically equated with its role in general international law.' See Maarten den Heijer & Rick Lawson, *Extraterritorial Human Rights and the Concept of 'Jurisdiction'*, *in* GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW 163, (Malcolm Langford, et al. eds., 2013).
[383] Marko Milanovic, *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties*, HUMAN RIGHTS LAW REVIEW 411(2008). pp.447-448.

constitute an exercise of jurisdiction.[384] The ECtHR has recognized a number of exceptional circumstances capable of giving rise to an exercise of jurisdiction by a Contracting State outside its own territorial boundaries.[385] The ECtHR has figured out the following two situations that constitute a jurisdiction of a State.

3.2.1. Effective Control over an Area

The *Loizidou v. Turkey (1996) case* was the early case that dealt with the meaning of jurisdiction. The ECtHR in this case put forward the criterion of 'effective control over an area' to judge the notion of jurisdiction. The court has stated that:

> [I]t stressed that under its established case-law the concept of 'jurisdiction' under Article 1 of the Convention (art. 1) is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Of particular significance to the present case the Court held, in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action -whether lawful or unlawful -it exercises effective control of an area outside its national territory.[386]

It seems that the ECtHR did not draw a distinction between the question of attribution (the issue of secondary rules) and the scope of positive obligations (the issue of primary rules) in the *Loizidou v. Turkey* case. The ECtHR has illuminated that 'effective control over an area' is qualified as jurisdiction under the meaning of Article 1 of the ECHR. In the *Cyprus v. Turkey (2001)* case, the ECtHR still confused the attribution issue and the scope of positive obligations. In this case, the

[384] The European Court of Human Rights, Al-Skeini and Others v. the United Kingdom, Grand Chamber, Judgment of 7 July 2011, para.131.
[385] Id, para.132.
[386] The European Court of Human Rights, Loizidou v. Turkey, Chamber, Judgment of 18 December 1996, para.52.

court introduced a new expression, namely 'effective overall control over (an area)'. The court stated that:

> Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's 'jurisdiction' must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.[387]

In the above statement of the ECtHR, the attribution issue and the scope of positive obligations are in such a tangle that it is unclear whether 'effective overall control' is the criterion for the attribution issue or for the meaning of jurisdiction.[388] It seems that 'effective overall control over an area' is a criterion both for the attribution issue (secondary rules) and for the meaning of jurisdiction (primary rules) in the *Cyprus v. Turkey* case. However, the ECtHR has hardly used the expression of 'effective overall control over an area' in similar cases since the *Cyprus v. Turkey (2001)* case. In recent cases, the ECtHR has interpreted 'effective control over an area' as a form of jurisdiction.

In the *Banković and Others v. Belgium and Others (2001)* case, the ECtHR reaffirmed that 'effective control over an area' is an exceptional situation in which a State exercises its jurisdiction extraterritorially.[389] However, the ECtHR in this case put forward the concept of legal space (*espace juridique*), which limits State extraterritorial obligations to individuals in the territory of another contracting party

[387] The European Court of Human Rights, Cyprus v. Turkey, Grand Chamber, Judgment of 10 May 2001, para.77.
[388] Monica Hakimi, *State Bystander Responsibility*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 341(2010).p.353.
[389] The European Court of Human Rights, Banković and Others v. Belgium and Others, Grand Chamber, Decision as to the Admissibility of Application, 12 December 2001, para.71.

of the ECHR but under the effective control of the former State.[390] The concept of legal space has been criticized as egregious and atrocious.[391] Indeed, the ECtHR has overruled that concept in the *Al-Skeini and Others v. the United Kingdom (2011)* case.[392] According to the jurisprudence of the ECtHR now, effective control over any area, whether or not the territory of contracting parties of the ECHR, gives rise to an exercise of jurisdiction by the State making such control.

3.2.2. Authority and Control over Individuals

In addition to effective control over an area, the ECtHR has come up with the criterion of authority and control over individuals to judge State jurisdiction.[393] This criterion is less onerous than to prove effective control over an area.

With the development of high technology, States have the ability to launch long-range precise attacks against individuals abroad. In fact, such attacks sometimes happen, like the situation in the *Banković* case. The question then arises: Does the criterion of authority and control over individuals only refer to the physical custody of individuals? Could the ability of remote precise attack itself give rise to authority and control over individuals? Some authors think that the actual custody of individuals is not necessary for the criterion of authority and control over individuals and that State's ability to launch a remote precise attack is sufficient to give rise to the authority and control over individuals.[394] One scholar has argued that the jurisdiction clause is satisfied in terms of the obligation to respect as long as a State action directly influences individuals abroad.[395] However, most cases before the ECtHR concern the obligation to investigate (a positive obligation), for example

[390] Id, para.80.
[391] Roxstrom, et al., supra note 109, p.56.
[392] The European Court of Human Rights, Al-Skeini and Others v. the United Kingdom, Grand Chamber, Judgment, 7 July 2011, para.142.
[393] The European Court of Human Rights, Issa and Others v. Turkey, Chamber, Judgment of 30 March 2005, para.71. The European Court of Human Rights, Al-Skeini and Others v. the United Kingdom, Grand Chamber, Judgment, 7 July 2011, paras.136-137.
[394] King, HUMAN RIGHTS LAW REVIEW, (2009). pp.552-553. Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 INTERNATIONAL LAW STUDIES 20(2014). pp.41-49.
[395] Schaack, Id, pp.52-53.

the *Banković* case, the *Al-Skeini* case and the *Jaloud* case.[396] What is the meaning of 'authority and control over individuals' with regard to positive obligations? The ECtHR in the *Banković* case opposed the idea that 'anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention'.[397]

The ECtHR in the *Al-Skeini and Others v. the United Kingdom (2011)* case has supported the argument that the actual custody of individuals is unnecessary for the criterion of authority and control over individuals.[398] The ECtHR has further pointed out that:

> [T]he United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.[399]

The ECtHR seems to have admitted that anyone directly affected by a State's physical power is within the jurisdiction of the latter at least for the purpose of invoking the obligation to investigate (in this case, the applicants challenged that the respondent State had not properly investigated the death of the victims). In the *Al-Skeini* case, the ECtHR supported the gradual approach of jurisdiction to some extent. It has stated that:

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[396] The European Court of Human Rights, Banković and Others v. Belgium and Others, Grand Chamber, Decision as to the Admissibility of Application, 12 December 2001, para.39. The European Court of Human Rights, Al-Skeini and Others v. the United Kingdom, Grand Chamber, Judgment, 7 July 2011, para.151. The European Court of Human Rights, Jaloud v. the Netherlands, Judgment, 20 November 2014, para.157.
[397] The European Court of Human Rights, Banković and Others v. Belgium and Others, Grand Chamber, Decision as to the Admissibility of Application, 12 December 2001, para.75.
[398] The European Court of Human Rights, Al-Skeini and Others v. the United Kingdom, Grand Chamber, Judgment, 7 July 2011, para.136.
[399] Id, para.149.

> It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'.[400]

But the ECtHR did not further elaborate on how rights or obligations can be divided or tailored; it also did not explicitly propose different thresholds for different types of obligations.

The ECtHR in the *Jaloud v. the Netherlands (2014)* case reaffirms that anyone directly affected by a State's actual power is within the jurisdiction of the latter for the purpose of invoking the obligation to investigate.[401] In this case, the victim met his death when a vehicle in which he was a passenger was fired upon while passing through a checkpoint in Iraq manned by personnel under the command and direct supervision of a Netherlands Royal Army officer.[402] The applicant alleged that the Netherlands had failed to meet its obligations to investigate the death of the victim properly.[403] The ECtHR holds that the respondent party exercised its jurisdiction within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint.[404] In this case, the victim was not in the actual custody of the respondent State before he was killed, but the victim was directly affected by the physical power of the respondent State. Therefore, in the *Al-Skeini* and the *Jaloud* case, the ECtHR has clarified that individuals directly affected by the physical power of a State are within the jurisdiction of the State.

In the above cases, State agents were directly involved in related activities abroad. Due to the lack of information and evidence, the plaintiffs did not challenge State

[400] Id, para.137.
[401] The European Court of Human Rights, Jaloud v. The Netherlands, Judgment, 20 November 2014, para.152.
[402] Id.
[403] Id, para.157.
[404] Id, para.152.

obligation to respect human rights. Instead, they invoked State obligation to investigate human rights violations.[405] In many cases where human rights are infringed upon, frequently the State alone has access to relevant information.[406] The above-mentioned ECtHR case law has indicated that when preliminary evidence shows a State's direct involvement in a human rights abuse abroad, an obligation to investigate is imposed on the State. The situation of human rights impacts due to overseas investments of a State-owned corporation is comparable to the above cases. This book has argued that the conduct of a State-owned corporation should be attributed to the home State.[407] If there is clear evidence of a human rights abuse by that State-owned corporation in a host State, the home State can be responsible for the violation of the obligation to respect human rights. If there is not adequate evidence but only preliminary evidence of human rights abuse caused by a State-owned corporation, the home State is imposed on an obligation to investigate. A similar obligation can also be derived from the ICCPR, which will be discussed in a subsequent part (Section 4.3.2).

3.3. Assessment

The ECtHR has supported the ETO approach in some cases concerning a State's military actions abroad. What was challenged in those cases was mainly State obligation to investigate (procedural positive obligation). State positive obligations are subject to the jurisdiction clause according to the ECtHR case law. Available case law indicates that the notion of jurisdiction in human rights treaties is different from that in international law. Jurisdiction in human rights law refers to situations in which a State wields particular forms of power over individuals.[408]

The ECtHR's existing benchmark for jurisdiction could not support home State obligations over ordinary MNCs in general. What is decisive in the *Al-Skeini* case

[405] Supra note 396.
[406] Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIFORNIA LAW REVIEW 449(1990).p.507.
[407] Section 7 of Chapter 2.
[408] Supra note 382, p.190.

and the *Jaloud* cases is the State's physical power over individuals which constitutes State jurisdiction over those individuals when the abuse against them occurs. In the discourse of business and human rights, a home State does not exert physical power over corporate victims in a host State when an ordinary corporation is abusing their rights. A home State's action (for example providing subsidies to a corporation abroad) or omission (for example doing nothing) is not comparable to a State's physical power over individuals during its military actions abroad. However, the situation concerning a State-owned corporation is different. Actions and omissions of a State-owned corporation are arguably attributed to a home State.[409] The ECtHR has sometimes conflated the concepts of jurisdiction and attribution. The ECtHR has sometimes conflated the concepts of jurisdiction and attribution and it seems that jurisdiction under Article 1 of the ECHR is established once there is an attribution.[410] Therefore, it is arguable that individuals whose rights are directly affected by a State-owned corporation in a host State are within the jurisdiction of a home State according to the ECtHR's 'physical power over the person' standard in the *Al-Skeini* and the *Jaloud* cases.

4. A Theoretical Model of the Scope of State Obligations under the ICCPR

The ICCPR is a general treaty on civil and political rights. The question arises as to how we should understand the scope of State obligations under this treaty. This section proposes a theoretical model for understanding the scope of State obligations under the ICCPR based on the experiences and lessons learned from the above academic debates and the following debates on the conjunctive or disjunctive interpretation of the territory and jurisdiction clause in Article 2(1) of the ICCPR. The theoretical model proposed in this chapter will be further justified by using the treaty interpretation method in the next chapter.

[409] Chapter 2, at 5.3.
[410] Jane M. Rooney, *The Relationship between Jurisdiction and Attribution after Jaloud v. Netherlands*, 62 NETHERLANDS INTERNATIONAL LAW REVIEW 407(2015).p.427.

4.1. Existing Debates on the Conjunctive or Disjunctive Interpretation of the Territory and Jurisdiction Clause in Article 2(1) of the ICCPR

Unlike the ECHR, a double requirement can be found in Article 2(1) of the ICCPR, respectively 'within its territory' and 'subject to its jurisdiction'. There is a debate on how to interpret the word 'and' in the territory and jurisdiction clause therein. Under international law, there exists an intersecting relationship between the concept of territory and jurisdiction. On the one hand, persons within the territory of a State are usually considered subject to its jurisdiction, and only a very few people who are within the territory of a State may not be considered subject to its jurisdiction (for example, people in a leased area may be considered within the jurisdiction of another State).[411] On the other hand, persons beyond State borders could be subject to its jurisdiction, for example, passengers under the jurisdiction of the flag State on high seas.

In recent human rights practice, there are two different opinions on the interpretation of the territory and jurisdiction clause in Article 2(1) of the ICCPR: the conjunctive interpretation and the disjunctive interpretation.[412] However, both agree on one point that the territory and jurisdiction clause is the precondition for all kinds of State obligations. A few States, such as United States, insist on the conjunctive interpretation and assert that States only have obligations towards individuals within its territory and at the same time subject to its jurisdiction.[413]

By contrast, the Human Rights Committee (HRC) and the International Court of Justice (ICJ) have interpreted Article 2(1) in a disjunctive way that a State has

[411] Bernard H Oxman, Jurisdiction of States, Max Planck Encyclopedia of Public International Law, November 2007.
[412] Dominic McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights*, *in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno Kamminga eds., 2004).p.48.
[413] The Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, United States of America, 28 November 2005, CCPR/C/USA/3, Annex I, p.109.

obligations to the individuals within its territory and to the individuals subject to its jurisdiction. For example, the HRC states in its General Comment 31 that: 'States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction.'[414] The ICJ considers that: 'The International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.' [415] The outcome of the disjunctive interpretation seems to be satisfactory and therefore such an interpretation has been widely supported in the literature,[416] notwithstanding the consistent opponent views from a minority of States such as the United States and Israel.[417] The disjunctive interpretation has in fact interpreted the term 'and' in the 'territory and jurisdiction clause' as meaning 'or'.

Either approach has both positive and negative aspects. The US interpretation caters to the literal meaning of the term 'and', but it may cause unsatisfactory and even absurd results in that such an interpretation encourages a State to perpetrate human rights violations on the territory of another State, which it could not perpetrate on its own territory.[418] According to Article 32 of the VCLT, the preparatory work of a treaty and the circumstances of its conclusion could be used as supplementary means to avoid an absurd result. The preparatory work of the ICCPR shows that the purpose of the drafters to insert the territory criterion is to exclude the positive

[414] The Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004, CCPR/C/21/Rev.1/Add.13, para.10.
[415] The International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, para.111.
[416] McGoldrick, supra note 412, p.55. GONDEK, supra note 66, p.213. Hugh King, *The Extraterritorial Human Rights Obligations of States*, 9 HUMAN RIGHTS LAW REVIEW 521(2009). p.523.
[417] Schaack, supra note 394, pp.57-60.
[418] Human Rights Committee, Sergio Euben Lopez Burgos v. Uruguay, CCPR/C/13/D/52/1979, 29 July 1981, para.12(3).

obligations of promoting human rights in other countries rather than indulging a State that is deliberately infringing on human rights abroad.[419]

It is worth mentioning that, although on the international stage the US government still insists that States should only have obligations towards individuals within its territory and at the same time subject to its jurisdiction, the US Supreme Court has supported extraterritorial obligations in domestic cases. In the *Reid v. Covert (1957)* case, the court held that American citizens outside of the territorial jurisdiction of the United States retain the protections guaranteed by the United States Constitution.[420] As for the foreign citizens outside American territory, the US Supreme Court at first held that the US Constitution does not apply to them. For example, in the *United States v. Verdugo-Urquidez (1990)* case, the court held that: 'The Fourth Amendment does not apply to the search and seizure by United States agents of property owned by a nonresident alien and located in a foreign country.'[421] However, the court changed its view afterwards and confirmed the extraterritorial obligations towards noncitizens abroad. In the *Boumediene v. Bush (2008)* case, petitioners are aliens detained at Guantanamo (in Cuba) after being captured in Afghanistan or elsewhere abroad and designated enemy combatants by US Combatant Status Review Tribunals. The US Supreme Court held that: 'Petitioners have the constitutional privilege of habeas corpus. They are not barred from seeking the writ or invoking the Suspension Clause's protections because they have been designated as enemy combatants or because of their presence at Guantanamo.'[422]

The HRC's interpretation, namely the disjunctive interpretation, aimed to avoid the unsatisfactory or absurd result mentioned above. However, the disjunctive interpretation is problematic in the sense that it completely changes the meaning of

[419] MARC BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (Nijhoff. 1987). p.54.
[420] Reid v. Covert, Decided on 11 June 1956, 354 U.S. 1 (1957).
[421] United States v. Verdugo-Urquidez, Decided on 28 February 1990, 494 U.S. 259 (1990).
[422] Boumediene v. Bush, Decided on 12 June 2008, 553 U.S. 723 (2008).

the term 'and'.[423] Although, according to the customary rule of treaty interpretation (Article 31 and 32 of the VCLT), a treaty term is not necessarily interpreted in accordance with its ordinary meaning, a term can never be given a meaning that it does not have at all.

What caused such a dilemma that either approach to interpretation is problematic? Both sides had a common presumption that the territory and jurisdiction clause is the precondition for all kinds of State obligations. This presumption was wrong. There should not have been a debate on the meaning of the word 'and' in the territory and jurisdiction clause. In fact, the word 'and' can never mean 'or'. What should be debated is the nature and function of the territory and jurisdiction clause itself. For example, the question could be: which obligation should be read together with the territory and jurisdiction clause, the obligation to respect human rights or the obligation to ensure human rights? The next part will provide a theoretical model for understanding the scope of State obligations under the ICCPR.

4.2. The Structure of Article 2 of the ICCPR

Article 2 consists of three paragraphs and the territory and jurisdiction clause only appears in the first paragraph. Article 2(1) mentions both negative obligations (to respect) and positive obligations (to ensure). It also emphasizes the principle of non-discrimination. Article 2(1) is not an exclusive expression of all State obligations, as Article 2(2) and Article 2(3) also convey the content of State obligations. The preparatory work of the ICCPR also indicates that the whole of Article 2 rather than Article 2(1) deals with general obligations of State parties.[424] In this sense, Article 2(1) is only a descriptive but not a definitive provision of State

[423] Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 119(2005).p.127. Aldo S. Zilli, *Approaching the Extraterritoriality Debate: The Human Rights Committee, the U.S. and the ICCPR*, 9 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 399 (2011).p.417.

[424] BOSSUYT, Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights. 1987. p.52.

obligations. There is no reason, therefore, to take the territory and jurisdiction clause as the precondition for all kinds of State obligations.

Even within Article 2(1), the territory and jurisdiction clause does not necessarily limit the scope of both negative and positive obligations. The Human Rights Committee has stated in General Comment No.31 that: 'A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction.'[425] According to these remarks, the territory and jurisdiction clause should be read only in conjunction with the verb 'ensure'. This interpretation makes sense because the expression 'all individuals within its territory and subject to its jurisdiction' is closely aligned with the verb 'ensure' and, more importantly, such an interpretation could avoid the absurd result of indulging a State that is deliberately violating human rights abroad. Regrettably, the HRC provided a paradoxical statement in another paragraph of the same General Comment. The HRC stated that: 'States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.'[426] This time the HRC read the territory and jurisdiction clause in conjunction with both the phrase 'to respect' and the phrase 'to ensure'.

One can get a better understanding of Article 2 by reference to the idea of human rights as both subjective rights and an objective order of values, which is explained in the introduction to this book. Article 2(1) and Article 2(3) explicitly confer entitlements upon individuals. Draft Article 2(2) also contained clear language of entitlements upon individuals, but the final version of Article 2(2) deleted the

[425] Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004, CCPR/C/21/Rev.1/Add.13, para.3.
[426] Id, para.10.

expression of 'Every State party hereto undertakes to ensure...to all individuals within its jurisdiction'.[427] It is submitted, based on the different language used in the three paragraphs, that individuals who fall within Article 2(1) enjoy a full spectrum of entitlements with regard to each human right, whereas a State owes due diligence obligations, on the basis of Article 2(2) in conjunction with articles on a specific human right, to individuals who do not fall within Article 2(1).

For a certain State obligation to arise, Article 2 should be read in conjunction with a specific article in Part III of the ICCPR that provides a concrete human right. The ICCPR contains two groups of human rights, namely civil rights and political rights, although they are not neatly separated from each other. At least some political rights are exclusively concerned with the relationship between a State and its citizens.[428] Article 25 is a good example that some rights are by their nature only enjoyed by a State's citizens. These rights include the right to take part in the conduct of public affairs, the right to vote and to be elected, and the right to have access, on general terms of equality, to public service in his country. The theoretical model proposed in the following part mainly deals with civil rights which may be invoked by non-citizens.[429]

4.3. The Scope of State Obligations on the Basis of Article 2(1) and Article 2(3)

This section explains the scope of State obligations under Article 2(1) and Article 2(3). According to Article 2(3), an effective remedy can be invoked by 'any person'. Article 2(1) speaks of the obligation to respect and to ensure human rights together. This book argues that the territory and jurisdiction clause should only restrict the scope of the obligation to 'ensure' human rights (positive obligations). The term

[427] Bossuyt, Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights. 1987. p.58.
[428] KÄLIN & KÜNZLI, The Law of International Human Rights Protection. 2009. p.466.
[429] Id.

'ensure' may indicate both substantive and procedural positive obligations.[430] However, Article 2(3) has specifically provided for procedural positive obligations. It is submitted that the territory and jurisdiction clause in Article 2(1) only restricts the scope of the right-holders for substantive positive obligations.

4.3.1. The Scope of Negative Obligations

A negative obligation is the obligation of abstention. The fulfillment of such an obligation requires little resources, because it only requires a State to refrain from directly infringing on human rights. It is arguable that a negative obligation has no territory or jurisdiction limitation.[431] The notion is based on the idea that a State is not allowed to perpetrate violations of human rights on the territory of another State, which it could not perpetrate on its own territory.[432] In a word, negative obligations are owed to anybody, anywhere.

The ICJ has affirmed that the ICCPR is capable of extraterritorial application in the *Wall* Advisory Opinion and the *DRC v. Uganda* judgment.[433] Although the ICJ has mentioned the word 'jurisdiction', it has not shed light on when an individual is within the jurisdiction of a State. The ICJ has implied that once an act damaging human rights abroad can be directly attributed to a State, the ICCPR is applicable to this situation.[434] Therefore, the extraterritorial application of the ICCPR does not face any obstacle when negative obligations are at issue. The difficulty for invoking State negative obligations under the ICCPR becomes an issue of direct attribution.

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[430] MICHAEL K. ADDO, THE LEGAL NATURE OF INTERNATIONAL HUMAN RIGHTS (Martinus Nijhoff Publishers. 2010). p.222.
[431] Vassilis P. Tzevelekos, *Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility*, 36 MICHIGAN JOURNAL OF INTERNATIONAL LAW 129(2014).p.147. MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (Oxford University Press. 2011).p.209.
[432] The European Court of Human Rights, Issa and Others v. Turkey, Chamber, Judgment, 30 March 2005, para.71.
[433] ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, para.111. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, para.216.
[434] Id.

In the discourse of business and human rights, a home State should not assist in corporate human rights abuses abroad, for example, by providing subsidy or overseas investment insurance to the corporations that could potentially abuse human rights in host States. The home State would otherwise be responsible for the conduct of assistance. If a corporation's acts can be directly attributed to the home State according to the secondary rules of international law,[435] then the home State has to ensure that the corporation should respect human rights abroad, because otherwise the home State would breach its own obligation to respect human rights.

4.3.2. The Scope of Positive Obligations

The word 'to ensure' under Article 2(1) implies State positive obligations. According to General Comment No.31 of the HRC, the legal obligation under Article 2(1) of the ICCPR is both negative and positive in nature.[436] The HRC has stated that positive obligations will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights.[437] The HRC has clarified that a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[438] In this sense, State positive obligations under the ICCPR include obligations to regulate private actors. The problem for this book is whether and when could positive obligations entail home State obligations.

[435] For example, a corporation is exercising certain elements of governmental authority according to Article 5 of the ILC Articles.
[436] Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004, CCPR/C/21/Rev.1/Add.13, para.6.
[437] Id, para.8.
[438] Id.

The HRC has not divided positive obligations into subgroups. In the context of the ECHR, positive obligations are categorized into substantive and procedural positive obligations.[439] The recent literature shows that authors begin to use the tripartite typology (the obligations to respect, to protect and to fulfill) to analyze State obligations arising from both civil and political rights and economic, social and cultural rights.[440] The obligation to protect, which requires a State to regulate a third party, may entail both substantial and procedural obligations. Substantive positive obligations require a State to provide benefits to individuals for the full enjoyment of the rights guaranteed in the ICCPR.[441] The substantial side of the obligation to protect requires a State to take legislative or institutional measures, for example laying down proper rules governing intervention by the police, prohibiting ill-treatment or forced labor, incorporating human rights into adoption procedures or more broadly into family law, etc.[442] For example, the ECtHR has stated in the *X and Y v. the Netherlands* case that the obligations under Article 8 of the ECHR may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.[443] Substantive positive obligations in the wide sense also include obligations to provide protection within private law relations.[444]

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[439] LAURENS LAVRYSEN, HUMAN RIGHTS IN A POSITIVE STATE: RETHINKING THE RELATIONSHIP BETWEEN POSITIVE AND NEGATIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Intersentia. 2016).p.47.

[440] KÄLIN & KÜNZLI, The Law of International Human Rights Protection. 2009. pp.96-97. Monica Hakimi, *State Bystander Responsibility*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 341(2010).p.347. Ashfaq Khalfan & Ian Seiderman, *Extraterritorial Human Rights Obligations: Wider Implications of the Maastricht Principles and the Continuing Accountability Challenge*, *in* CHALLENGING TERRITORIALITY IN HUMAN RIGHTS LAW (Wouter Vandenhole ed. 2015).p.20.

[441] Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations in* THE INTERNATIONAL BILL OF RIGHTS : THE COVENANT ON CIVIL AND POLITICAL RIGHTS (Louis Henkin ed. 1981). p.72.

[442] Jean-François Akandji-Kombe, Positive Obligations under the European Convention on Human Rights, Human rights handbooks, No. 7, Council of Europe, 2007, p.16.

[443] The European Court of Human Rights, X and Y v. the Netherlands, Chamber, Judgment, 26 March 1985, para.23.

[444] LAURENS LAVRYSEN, HUMAN RIGHTS IN A POSITIVE STATE: RETHINKING THE RELATIONSHIP BETWEEN POSITIVE AND NEGATIVE OBLIGATIONS

The scope of substantive positive obligations is restricted by the territory and jurisdiction clause in Article 2(1) of the ICCPR. For the legal certainty, the word 'and' between 'territory' and 'jurisdiction' should be interpreted in accordance with its literal meaning, namely a conjunctive interpretation. Therefore, substantive positive obligations generally do not have extraterritorial dimensions. Such an interpretation would not cause absurd results. It can cost a lot of resources to fulfill substantive positive obligations. In a world of coexistence of States, it is unpractical to expect a State to pay for the 'welfare' in another country. This book never denies that international society is changing towards a world of cooperation[445] and that the obligation of international cooperation is emerging even in the field of human rights law.[446] However, the obligation or duty to cooperate is not a substantive obligation to guarantee a certain right in another country, for example to provide food in another country. It only requires States to create a healthy international environment to promote the enjoyment of human rights universally. It is argued that the only reasonable way to achieve universal coverage of human rights, then, is for each State to protect them within its recognized territories (or territories it effectively occupies) and for each State to respect them everywhere.[447] It is also argued that a State cannot fulfill substantive positive obligations without having the tools to do so and therefore such obligations should be territorially limited to areas and places under the State's jurisdiction.[448] It is submitted that, if substantive positive obligations under the ICCPR could extend extraterritorially, they should be only extended to individuals in territories a State effectively occupies abroad. Therefore, a home State does not owe substantive positive obligations towards individuals located in a host State according to Article 2(1) of the ICCPR.

UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Intersentia. 2016).p.87.

[445] WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (Columbia University Press. 1964). p.251.

[446] SCHUTTER, International Human Rights Law: Cases, Materials, Commentary. 2014. pp.198-205.

[447] Roxstrom, et al., supra note 109, p.73.

[448] MILANOVIC, Supra note 57, p.219.

Assuming that the expression 'within its territory and subject to its jurisdiction' could be interpreted as 'within its territory or subject to its jurisdiction', which was adopted by the HRC in the *Mohammad Munaf v. Romania* case,[449] do individual victims of a corporate human rights abuse in a host State fall within the jurisdiction of a home State? The *Mohammad Munaf v. Romania* case concerns extraterritorial violations of the ICCPR.[450] The HRC has stated that:

> [A] State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction. Thus, the risk of an extra-territorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time.[451]

Is a corporate human rights abuse in a host State a necessary and foreseeable consequence of a home State's failure to regulate an MNC? A home State could argue that its non-regulation of an MNC does not necessarily cause a human rights abuse in a host State, because the host State is expected to regulate human rights abuses. In fact, a home State does not directly exert power or influence on individuals in a host State. The causal chain is incomplete between a home State's failure to regulate and human rights abuses in a host State. Other factors are needed to complement the incomplete causal chain so as to prove the home State

[449] Human Rights Committee, Mohammad Munaf v. Romania, 21 August 2009, CCPR/C/96/D/1539/2006.
[450] Id, paras.2.1-3.1. The author of this communication is an Iraqi-American dual national. He was kidnapped together with other three persons by unknown armed forces in Iraq. Afterwards, they were all released without harm and taken to the Romanian Embassy in Iraq. The Romanian Embassy immediately handed the author of that communication over to 'United States military officers'. He was afterwards threatened with torture and subjected to abuse and mistreatment in US military's custody. He claimed a violation of article 6, as the State party made no inquiry and sought no assurances before allowing US officers to remove him from the safety of the Romanian Embassy.
[451] Id, para.14.2.

jurisdiction over individuals in a host State.[452] Generally speaking, it is hard to prove that individuals in a host State are within the jurisdiction of a home State.

The procedural side of the obligation to protect requires a State to provide procedural remedies to those individuals whose rights are violated. The procedures include but are not limited to the investigation into criminal offences, the judicial review of a lawsuit against other private actors, and administrative sanctions. To fulfill procedural positive obligations also costs State's resources, but the cost is necessary in a country based on the rule of law.[453] Article 2(3) of the ICCPR confers a right to an effective remedy upon 'any person'. It does not contain a limitation on the scope of the right-holders. However, Article 2(3) does not guarantee that individuals from a host State can get a substantial redress in a home State against a corporate perpetrator because the ICCPR itself does not have a direct horizontal effect.[454]

The term 'remedy' in human rights literature could mean 'access to justice' (procedural aspect) or it could mean 'substantive redress' (substantive aspect).[455] When we refer to a remedy for a governmental violation of human rights, Article 2(3) may entail both the procedural and substantive aspects of a remedy. However, when we refer to a remedy for a private abuse of human rights, Article 2(3) only entails access to justice, namely a procedural obligation on State. That is because the ICCPR does not have a 'direct horizontal effect'.[456] The ICCPR cannot be

[452] For instance, the next chapter will argue that individuals in a host State can fall within the jurisdiction of a home State in proportion to the extent that the home State has limited the regulatory power of the host State through international investment law practice.
[453] The UNGP, Commentary to Principle 1. GERANNE LAUTENBACH, THE CONCEPT OF THE RULE OF LAW AND THE EUROPEAN COURT OF HUMAN RIGHTS (Oxford University Press. 2013).p.56.
[454] Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004, CCPR/C/21/Rev.1/Add.13, para.8.
[455] DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (Oxford University Press 2 ed. 2005). pp.7-9.
[456] Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004, CCPR/C/21/Rev.1/Add.13, para.8.

viewed as a substitute for domestic criminal or civil law.[457] Substantive redress for a private abuse should be determined by the domestic law of a State. Whether relevant domestic law could provide substantive redress is a matter of substantive positive obligations (to ensure human rights) under Article 2(1) of the ICCPR. Therefore, a home State owes procedural obligations to individuals located in a host State according to Article 2(3) of the ICCPR. When an MNC abuses human rights in a host State, individual victims are entitled to request the home State of the MNC to adjudicate the lawsuit they bring according to the home State's domestic law. However, a home State does not guarantee substantive redress.

Although Article 2(3) does not suffice to redress a human rights abuse committed by an ordinary MNC before a home State court, it imposes an obligation on a home State to investigate human rights abuse committed by its State-owned corporations abroad. Article 2(3) has a function of shifting the burden of proof to a State if it denies a violation of negative obligation where there is preliminary evidence.[458] This book has already argued that a State has an extraterritorial obligation to respect human rights, and that the conduct of a State-owned corporation should be attributed to its home State.[459] If a home State denies that its State-owned corporation has abused human rights abroad where there is preliminary evidence of such an abuse, the home State should at least investigate the situation at hand.

4.4. The Scope of State Obligations on the Basis of Article 2(2)

Human rights are universal.[460] A State owes a full spectrum of obligations to individuals who fall within Article 2(1) under the ICCPR. However, people who do not fall within Article 2(1) may still request a State to fulfill certain obligations.

[457] Id.
[458] Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIFORNIA LAW REVIEW 449(1990).p.506.
[459] Section 7 of Chapter 2, Section 4.3.1 of this chapter.
[460] The preamble of the ICCPR contains an expression of 'the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms'.

Monica Hakimi has generally argued that whether a State must protect someone from third-party harm depends on the State's relationship with the third party (abuser).[461] According to her, a State should restrain third parties in its territory no matter where the victims are.[462] The same approach could be derived from the interpretation of Article 2(2) of the ICCPR. Under Article 2(2), a State has obligations to adopt laws or measures to give effect to human rights. Article 2(2) itself does not contain the language for individual right-holders. Articles in Part III of the ICCPR (on a specific human right) usually use the expression of 'everyone', 'anyone', or 'no one'. It is submitted that a State owes due diligence obligations, on the basis of Article 2(2) in conjunction with articles on a specific human right, to individuals who do not fall within Article 2(1) (all individuals within its territory and subject to its jurisdiction). Society is always developing. Article 2(2) should be interpreted as requiring a State to adopt such laws or measures as may be necessary to give effect to human rights in light of social development. Therefore, a home State owes due diligence obligations to individuals located in a host State, because abusers are within the territory of the home State.

State obligations of such kind are non-relational obligations, which are based on the idea that human rights bind all State organs or guide State policy. With the deepening of economic globalization, it is argued that the laws and measures to be adopted should include those preventing corporations from abusing human rights abroad. This book calls such obligations territorial obligations because the underlying principle of such obligations is to deter abuser in the territory of a home State. In fact, such territorial obligations are supported by public international law. According to customary international law, States are not allowed to cause damages in other countries. Furthermore, States have obligations or duties to cooperate under international law.[463]

[461] Monica Hakimi, *State Bystander Responsibility*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 341(2010). p.354.
[462] Id, p.360.
[463] See the next chapter.

In the context of international investments, an MNC could set up or purchase a subsidiary which has an independent legal capacity in a host State. An MNC could also set up a branch which does not have an independent legal capacity in a host state. In terms of home State obligations discussed in this part, the corporations located in a home State should be regulated, not the subsidiaries or branches in a host State.

5. Conclusion

The ETO approach in the area of civil and political rights was posed by scholars to tackle the problem of human rights impacts during a State's military actions abroad. The ECtHR, the HRC and the ICJ have endorsed the ETO approach to some extent. Generally speaking, the extraterritorial dimension of negative obligations encounters little opposition.[464] According to Article 2(1) of the ICCPR, negative obligations are owed to anybody, anywhere. Article 2(3) of the ICCPR requires a State to investigate an alleged violation of human rights committed by its State agent abroad. These obligations are relevant for home State obligations in regards to its State-owned corporations. If there is clear evidence of a human rights abuse by a State-owned corporation in a host State, the home State can be responsible for a violation of the obligation to respect human rights. If there is not adequate evidence but only preliminary evidence of human rights damage caused by a State-owned corporation, the home State is imposed on an obligation to investigate the situation.

Some branches of the scholarly ETO approach could support home State obligations to regulate ordinary corporations in general on the basis of

[464] Hugh King, The Extraterritorial Human Rights Obligations of States, 9 HUMAN RIGHTS LAW REVIEW 521(2009).p.556. Erik Roxstrom, et al., The NATO Bombing case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights protection, 23 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 55(2005).p.72. MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (Oxford University Press. 2011).p.209.

extraterritorial dimensions of positive obligations.[465] However, extraterritorial dimensions of positive obligations may encounter substantial opposition.[466] There are generally two approaches to substantiating home State obligations over ordinary corporations in human rights law: the first one is to prove that individuals affected by an MNC in a host State are within the jurisdiction of the home State in the context of relevant human rights treaty; the second one is to explore State obligations when abusers are within the State's jurisdiction but the individual victims are not. The first approach is pertinent for other human rights treaties, but it may not work well with the ICCPR, because Article 2(1) of the ICCPR has already adopted the expression of 'all individuals within its territory and subject to its jurisdiction'. This book has noticed that the HRC has interpreted the term 'and' in a disjunctive way, which is out of consideration of avoiding absurd result.[467] But the HRC has severely deviated the meaning of the logical term—and. In fact, the absurd result could also be avoided by reconsideration of the function of the expression of 'all individuals within its territory and subject to its jurisdiction' under Article 2(1). This chapter has argued that such an expression should be read only in conjunction with the phrase 'to ensure' under Article 2(1).

The second approach is relevant for all human rights treaties. This chapter has argued that a State owes due diligence obligations, on the basis of Article 2(2) in conjunction with articles on a specific human right under the ICCPR, to individuals who do not fall within Article 2(1) (all individuals within its territory and subject to its jurisdiction). A home State owes due diligence obligations to individuals located

[465] Rick Lawson, *Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights*, *in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno Kamminga eds., 2004).p.120. Hugh King, The Extraterritorial Human Rights Obligations of States, 9 HUMAN RIGHTS LAW REVIEW 521(2009).p.556.

[466] MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (Oxford University Press. 2011).p.216. Claire Methven O'Brien, The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Case of Extraterritorial Overreach?, DIHR Matters of Concern Human Rights Research Papers No.2016/04, p.23.

[467] The Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004, CCPR/C/21/Rev.1/Add.13, para.10.

in a host State, because abusers are within the territory of the home State. This will be further justified by the method of treaty interpretation in the next chapter.

Chapter 4 The Scope of State Obligations under the ICESCR

1. Introduction

MNCs could help to realize economic, social and cultural rights (ESC rights) because they offer jobs and income to local residents in host States. But MNCs are also capable of undermining the realization of ESC rights in a host State.[468] This chapter explores whether the ICESCR could give rise to home State obligations over MNCs. It proposes a theoretical model of the scope of State obligations under the ICESCR on the basis of a literature review of academic debates and case law analysis. This chapter justifies home State obligations by interpreting the term of jurisdiction and by deriving State due diligence obligations in accordance with the treaty interpretation method.

It is undisputed that a State has human rights obligations towards individuals within its territory. State obligations include the obligation to protect, namely preventing or prohibiting third parties from violating recognized rights or freedoms.[469] In this sense, a host State of multinational corporations definitely has the obligation to protect individuals within its territory from abuses committed by multinational corporations. It is not straightforward under the ICESCR, however, whether home States have similar obligations to prevent multinational corporations from violating human rights in a host State. The newly developed approach to extraterritorial obligations (ETOs) in the area of economic, social and cultural rights is relevant for the current topic because it deals with State obligations towards individuals in

[468] Daniel Aguirre, *Multinational Corporations and the Realisation of Economic, Social and Cultural Rights*, 35 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 53(2004). p.61.
[469] G.J.H. van Hoof, *The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views*, *in* THE RIGHT TO FOOD (Philip Alston & Katarina Tomaševski eds., 1984). pp.106-108.

another State.[470] The argument of this chapter is developed by reviewing the existing ETO approaches.

The ICESCR does not contain a jurisdiction clause in general. This chapter adopts a cautious approach to positive obligations, namely a jurisdiction clause being read into for positive obligations towards individuals without prejudice to State due diligence obligations to control activities within its territory. However, this chapter proposes a wider interpretation of jurisdiction than the ECtHR case law in the face of present-day conditions of the international society.[471] Previous research has revealed a tension between investment protection and human rights, and therefore the harmonization of them is needed.[472] This chapter argues that jurisdiction in regards to the obligation to protect under human rights law should be interpreted in the light of international investment law practice.

Section 2 of this chapter explains the absence of a jurisdiction clause in the ICESCR and the legal nature of the rights and obligations under the ICESCR. Section 3 elucidates different ETO approaches by reference to the relevant practice of international tribunals and treaty bodies, such as the ICJ, the Inter-American Commission on Human Rights (the Inter-American Commission), and the Committee on Economic, Social and Cultural Rights (the CESCR). Section 4 analyzes the role of jurisdiction for positive obligations under the ICESCR. It explains why this chapter reads a jurisdiction clause into the ICESCR. Section 5 sheds light on home State due diligence obligation, which provides an alternative approach to home State obligations over ordinary companies. Section 6 deals with the extraterritorial obligation to respect human rights, which concerns home State obligations over State-owned corporations.

[470] SKOGLY, Beyond National Borders: States' Human Rights Obligations in International Cooperation. 2006. p.70.
[471] Supra note 122.
[472] Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 573(2011).p.574.

2. Treaty Provisions and the Legal Nature of Rights and Obligations under the ICESCR

2.1. Treaty Provisions

The ICESCR does not contain a jurisdiction clause in the provision on general obligation of States. The general obligation of State parties is 'to take steps, individually and through international assistance and co-operation… to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized...'[473] This article provides considerable space for extraterritorial dimensions in the sense that it does not contain any spatial limitation at all.[474] Maarten den Heijer and Rick Lawson have revealed that some obligations under the ICESCR may not be dependent on the existence of a specific 'jurisdictional link' between a State and a particular individual.[475] In addition, articles in Part III (on a specific right) of the ICESCR employ the language of 'recognize the right of everyone' or 'ensure the right of everyone'. Does a State owe all types of obligations under the ICESCR to anyone in the world? Is home State obligation to regulate an MNC self-evident under the ICESCR? To give an affirmative answer to the second question too quickly will not persuade opponents of home State obligation.[476] The scope of State obligations will be further elaborated and explained through a discussion of case law.

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[473] The ICESCR, Article 2(1).

[474] Malcolm Langford, et al., *Extraterritorial Duties in International Law*, *in* GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW 51-52, (Malcolm Langford, et al. eds., 2013). p.52.

[475] Maarten den Heijer & Rick Lawson, *Extraterritorial Human Rights and the Concept of 'Jurisdiction'*, *in* GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW (Malcolm Langford, et al. eds., 2013).p.184.

[476] Claire Methven O'Brien, The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Case of Extraterritorial Overreach?, DIHR Matters of Concern Human Rights Research Papers No.2016/04, p.23. John Gerard Ruggie, *Protect, Respect and Remedy: A United Nations Policy Framework for Business and Human Rights*, 103 American Society of International Law: Proceedings of the Annual Meeting 2009 282(2009).p.283.

2.2. The Legal Nature of Rights and Obligations under the ICESCR

Before continuing, it is necessary to elucidate the legal nature of rights and obligations under the ICESCR, because this issue is closely linked to another issue: the role of jurisdiction in human rights law. There used to be fierce debates on the legal nature of ESC rights in the human rights domain. The debates mainly focused on the following questions: Are ESC rights real rights or do they merely set forth hortatory goals, ambitions or aspirations?[477] Some think that ESC rights are legal rights and entail specific State obligations, whereas others merely take them to be aspirational principles.

Amartya Sen has implied that ESC rights are rights but they do not necessarily grant entitlements.[478] In his opinion, rights are relationships between distinct agents, for example, between one person and another, or between one person and the State; a person's entitlements are the totality of things he can have by virtue of his rights.[479]

Egbert Vierdag has organized the provisions on ESC rights in the ICESCR into three categories: the first two categories contain subjective rights which can be enforced or conditionally enforced, such as Article 8, Article 15(1)(c), Article 15(3) (the first category), Article 9, Article 11 and Article 12 (the second category); the third category does not contain rights for individuals, but only expresses programs for governmental policies which cannot be enforced, such as Article 6, Article 11 and Article 13.[480] Vierdag has also asserted that: 'Only enforceable rights will be

[477] Michael J Dennis & David P Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be An International Complaints Mechanism to Adjudicate the Rights To Food, Water, Housing, and Health?*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 462 (2004). p.464.

[478] Amartya Sen, *The Right not to Be Hungry*, *in* LA PHILOSOPHIE CONTEMPORAINE/CONTEMPORARY PHILOSOPHY (1982).

[479] Id.

[480] Egbert W Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, 9 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 69 (1978). pp.102-103.

considered as real, legal, rights.'[481] The notion of justiciability or enforceability deals with whether an individual can invoke a right or a rule before a judicial or quasi-judicial body and/or consequently get a remedy from that body.[482] Some scholars have already revealed that justiciability or enforceability is not a prerequisite for a right, but it is the result of a challenge to a right.[483]

Vierdag's opinion has aroused criticism from other scholars.[484] Martin Scheinin has demonstrated that ESC rights are subjective rights by reference to the ICESCR in conjunction with the domestic legislation of some States.[485] Scheinin has assumed that treaties, constitutions together with ordinary acts of parliament and collective agreements between workers and employers are important sources of rights.[486] Some scholars have dealt with the justiciable issue under the ICESCR from the perspective of State obligations and this has triggered a tripartite typology of State obligations (to respect, protect, and fulfill) as an analytical tool among scholars.[487] Craig Scott has argued that focusing on the obligations side of ESC rights is a

[481] Id, p.77.
[482] The literature on justiciability or enforceability of ESC rights indicates that few scholars have made a clear distinction between the term 'justiciability' and the term 'enforceability'. See Martin Scheinin, *Justiciability and the Indivisibility of Human Rights*, *in* THE ROAD TO A REMEDY: CURRENT ISSUES IN THE LITIGATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (John Squires, et al. eds., 2005). p.25.
[483] Dennis & Stewart, supra note 477, p.514. Mirja Trilsch, Die Justiziabilität wirtschaftlicher, sozialer und kultureller Rechte im innerstaatlichen Recht (The justiciability of economic, social and cultural rights in domestic law), Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol. 34, Heidelberg: Springer, 2012. p.509.
[484] Eide, Economic, Social and Cultural Rights as Human Rights. 2001. pp.10-11. Martin Scheinin, Economic and Social Rights as Legal Rights, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK (Asbjørn Eide, et al. eds., 2001). pp.29-30.
[485] Martin Scheinin, Economic and Social Rights as Legal Rights, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK (Asbjørn Eide, et al. eds., 2001), pp.51-53.
[486] Id, p.49.
[487] Hoof, The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views. 1984. p.101.

fruitful way to render those rights justiciable.[488] Phillip Alston has argued that every right under the ICESCR gives rise to an absolute minimum entitlement.[489]

The CESCR has clarified and given more precision to the content of ESC rights in its monitoring practice. In its General Comment No.3, the CESCR has clarified that a number of provisions in the ICESCR are capable of immediate application by judicial and other organs.[490] In this General Comment, it has also expressed the idea of a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.[491] In its General Comment No.9, the CESCR has confirmed the justiciability of ESC rights.[492] In other general comments, the CESCR has also given precision to the normative content of relevant right. The Optional Protocol to the ICESCR (entered into force on 5 May 2013) has created an individual communication procedure, which is another proof of justiciability of ESC rights.

After several decades of developments in human rights theory and practice, the arguments that doubted the legal nature and the justiciability of ESC rights have been comprehensively rebutted in the literature and jurisprudence.[493] However, the above debates have not answered the following questions: Does a right under the ICESCR confer an entitlement or a claim against a certain State on anyone in the world? Do all kinds of obligations under the ICESCR give rise to an individual entitlement? These questions may relate to the role of jurisdiction in human rights

[488] Craig Scott, *Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 OSGOODE HALL LAW JOURNAL 769(1989).p.834.
[489] Phillip Alston, *Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic,Social and Cultural Rights*, 9 HUMAN RIGHTS QUARTERLY 332(1987).p.353.
[490] Committee on Economic, Social and Cultural Rights, General Comment No.3, E/1991/23, 1990, para.5.
[491] Id, para.10.
[492] The Committee on Economic, Social and Cultural Rights, General Comment No.9, E/C.12/1998/24, 3 December 1998, para.10.
[493] Mashood Baderin & Robert McCorquodale, *The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION (Mashood Baderin & Robert McCorquodale eds., 2007). p.14.

law: does 'jurisdiction over an individual victim' play any role in regard to the ICESCR?[494]

For the purpose of this book, two aspects of ESC rights need to be clarified further. First, ESC rights are not only positive rights but also have negative aspects. For example, Asbjørn Eide has rebutted the misconception that ESC rights always require the use of resources by a State, while the obligation for States to ensure the enjoyment of civil and political rights does not require resources.[495] It is now widely accepted that the ICESCR also prohibits States from interfering in ESC rights.[496] Second, there is no express language for the right of recourse to a remedy in the ICESCR. The missing language does not mean that an effective remedy is superfluous in the ICESCR. An effective remedy can be inferred from or is implied by 'appropriate means' in Article 2(1) of the ICESCR.[497] To have recourse to an effective remedy is indispensable in a society based on the rule of law. There are significant reasons for reading the right to an effective remedy into the ICESCR.[498] It should be noted that the right to an effective remedy need not be interpreted as always requiring a judicial remedy.[499]

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[494] Maarten den Heijer & Rick Lawson, Extraterritorial Human Rights and the Concept of 'Jurisdiction', in GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW (Malcolm Langford, et al. eds., 2013).p.184.Manisuli Ssenyonjo, *Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law*, 15 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 969(2011).p.987.

[495] ASBJØRN EIDE, et al., ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A TEXTBOOK (Nijhoff Publishers 2nd rev. ed. 2001). p.24.

[496] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997, available at: http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/TextsAdoptedByTheCentre.htm (last accessed 26-10-2015), para.6.

[497] Committee on Economic, Social and Cultural Rights, General Comment No.9, E/C.12/1998/24, 3 December 1998, para.3.

[498] Id.

[499] Kent Roach, *The Challenges of Crafting Remedies for Violations of Social, Economic and Cultural Rights*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (Malcolm Langford ed. 2008). pp.52-57.

3. Different Approaches to Extraterritorial Dimensions of Treaty Provisions without a Jurisdiction Clause in Case Law

This part describes four different approaches in existing human rights law practice of understanding the absence of jurisdiction clause. The first approach can be found in the case law of the Inter-American Commission that treats the treaty provision which does not contain a jurisdiction clause as if it had such a clause.[500] The second approach is to affirm the extraterritorial application of relevant treaties by mentioning the concept of jurisdiction in a very ambiguous way, such as the *Wall* Advisory Opinion, and the case concerning *Armed Activities on the Territory of the Congo*.[501] The ICJ has adopted a third approach (without mentioning the concept of jurisdiction) in the case concerning *Application of the International Convention on the Elimination of all Forms of Racial Discrimination*.[502] The CESCR has adopted a fourth approach by focusing on whether a perpetrator is within the territory or jurisdiction of a home State.[503]

3.1. The First Approach: Jurisdiction over Individual Victim

The Inter-American Commission has adopted the first approach. It has affirmed the extraterritorial application of the American Declaration of the Rights and Duties of Man (a declaration, not a treaty, hereafter 'American Declaration'), which does not contain a jurisdiction clause, by reading into it a concept of jurisdiction. In the *Coard et al. v. United States* case, for instance, the Inter-American Commission has pointed out that: 'Each American State is obliged to uphold the protected rights of

[500] Inter-American Commission on Human Rights, Coard et al. v. United States, Case 10.951, 29 September 1999, para.37.
[501] ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, para.112. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, para.217.
[502] ICJ, Georgia v. Russia Federation, Provisional Measures, Order of 15 October 2008, para.109.
[503] Committee on Economic, Social and Cultural Rights, General Comment No 19: The right to social security (art. 9), 4 February 2008, E/C.12/GC/19, para.54.

any person subject to its jurisdiction.'[504] Even though the American Declaration does not contain a jurisdiction clause, the Inter-American Commission did not directly rule on its extraterritorial application but only did so after confirming that the person concerned was subject to the jurisdiction of the State concerned.

3.2. The Second Approach: Mentioning Jurisdiction Very Ambiguously

The ICJ has adopted a second approach, which mentions the word of jurisdiction in an ambiguous way, in the *Wall* Advisory Opinion. In this Advisory Opinion, the ICJ has stated that:

> The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction… It would also observe that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights.[505]

Here, the ICJ admitted the extraterritorial scope of the ICESCR 'by reading into it a concept for applicability called jurisdiction which has an extraterritorial component'.[506] However, the ICJ did not clarify the purpose of using the expression 'territorial jurisdiction': Is this term related to the attribution issue? Or did the ICJ

[504] Inter-American Commission on Human Rights, Coard et al. v. United States, Case 10.951, 29 September 1999, para.37.
[505] ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, para.112.
[506] Wilde, CHINESE JOURNAL OF INTERNATIONAL LAW, (2013). 639, para.65.

use this term as a criterion to prove that an individual victim abroad is within the jurisdiction of the occupying State?

In the case concerning *Armed Activities on the Territory of the Congo*, the ICJ had another chance to deal with the extraterritorial application of human rights treaties. The human rights treaties challenged in this case included: the ICCPR, the African Charter on Human and Peoples' Rights (which does not contain a jurisdiction clause), and the Convention on the Rights of the Child.[507] The ICJ recalled the *Wall* Advisory Opinion and then concluded that: '[I]nternational human rights instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, particularly in occupied territories.'[508] The ICJ did not distinguish between human rights treaties with a jurisdiction clause and those without a jurisdiction clause. The ICJ did not elaborate on the meaning of 'in the exercise of its jurisdiction' either. In this case, the challenged actions are attributed to the respondent State.[509] It indicates that the extraterritorial obligation to respect human rights (negative obligation) is easy to be proven.

3.3. The Third Approach: Without Mentioning Jurisdiction

In the *Georgia v. Russia Federation* case, the ICJ adopted a different approach (the third approach) which offers a simpler explanation of the extraterritorial application of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) without reference to the concept of jurisdiction. Article 2 and Article 5 of the CERD were invoked in this case. They do not contain the term 'jurisdiction'.[510] The ICJ stated in its order of provisional measures that:

> …there is no restriction of a general nature in CERD relating to its territorial application; … in particular, neither Article 2 nor Article 5 of CERD,

[507] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, I.C.J. Reports 2005, para.217.
[508] Id, para.216.
[509] Id, para.215.
[510] Article 6 of the CERD contains the language of 'everyone within their jurisdiction'.

> alleged violations of which are invoked by Georgia, contain a specific territorial limitation; … these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory…[511]

One should bear in mind that it is in the order of provisional measures, not in a substantial judgement, that the ICJ pronounced the extraterritorial application of the CERD without considering whether the individuals are under the jurisdiction of the State concerned. An order of provisional measures only touches procedural matters and it does not deal with the merits of a case.[512] It remains unclear whether the ICJ would adopt the same approach to the extraterritorial application of human rights treaties in a judgement on the merits. In fact, the ICJ did not hear the merits of the *Georgia v. Russia Federation* case.[513] In addition, the respondent State directly took actions (by physical presence) in another State in this case. This case further verifies that the extraterritorial obligation to respect human rights faces little resistance.

3.4. The Fourth Approach: Jurisdiction over Abuser

The CESCR has adopted a fourth approach. In the General Comment No.19, it has stated that: 'States parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries.'[514] The CESCR has stated in its General Comment No.23 that: 'States parties should take measures, … to clarify that their nationals, as well as enterprises domiciled in their territory and/or jurisdiction, are required to respect

[511] ICJ, Georgia v. Russia Federation, Provisional Measures, Order of 15 October 2008, para.109.
[512] Article 41 of the Statute of the International Court of Justice provides that: 'The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.'
[513] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, para.185.
[514] Committee on Economic, Social and Cultural Rights, General Comment No 19: The right to social security (art. 9), 4 February 2008, E/C.12/GC/19, para.54.

the right...' [515] The CESCR did not answer whether the individuals seeking protection are within the jurisdiction of a home State, but it focused on whether a perpetrator is within the territory or jurisdiction of a home State.

The above case law and the CESCR interpretation indicate that once actions and omissions can be directly attributed to a State, the extraterritorial application of a specific human rights treaty faces little resistance. It confirms an argument that the extraterritorial obligations to respect have become part of existing law.[516] The jurisprudence on positive obligations is still very weak. Only the CESCR has systematically elucidated the extraterritorial dimension of positive obligations. It has recommended State parties to deter abusers within their territory and/or jurisdiction.

4. The Role of Jurisdiction for Positive Obligations

4.1. To Abandon or to Preserve: A Controversial Term

Several human rights treaties indicate that a State shall ensure the rights of individuals subject to its jurisdiction.[517] But the ICESCR does not contain such an expression. A question arises as to whether the concept of jurisdiction is pertinent to the scope of State obligations under the ICESCR or, to put it broadly, does the concept of jurisdiction play any role in the ICESCR? There are different opinions on this issue. Gilles Giacca has argued that the concept of jurisdiction over an individual victim is relevant for determining the extraterritorial aspects of all human

[515] Committee on Economic, Social and Cultural Rights, General Comment No 23: on the right to just and favorable conditions of work, 27 April 2016, E/C.12/GC/23, para.70.
[516] Fons Coomans, *Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights*, *in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno T. Kamminga eds., 2004).p.199.
[517] International Convention on the Elimination of All Forms of Racial Discrimination (Article 6), Convention on the Rights of the Child (Article 2), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 7), American Convention on Human Rights (Article 1).

rights treaties.[518] By contrast, Maarten den Heijer and Rick Lawson have criticized the presumption that under treaties securing ESC rights, the question of personal delimitation should be approached in a similar fashion as under treaties guaranteeing civil and political rights.[519] They have argued that positive obligations under the ICESCR are not necessarily limited by the concept of jurisdiction.[520]

Jurisdiction is traditionally about State rights to act (Is a State qualified to exercise its power in a certain situation?).[521] Human rights law deals with State obligations towards individuals. In this sense, it is weird to use a term which allocates rights among States to delimit the scope of obligations, because right is a benefit whereas obligation is a burden. The term of jurisdiction may cause a dilemma in human rights law: if it is understood in a narrow way, such as effective control over persons or territory, it will shield a State from its moral and legal responsibility;[522] if one wants to fill the protection gap, how widely should the term be interpreted without damaging legal certainty?

Two points make it sensible to disregard the term of jurisdiction in the discourse of the ICESCR. First, Article 2(1) of the ICESCR does not mention jurisdiction at all. Second, the duty to cooperate which is explicit under Article 2(1) of the ICESCR implies a wide extraterritorial dimension.[523] However, there are also reasons to give due consideration to jurisdiction over individual victims. One may question whether

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[518] GILLES GIACCA, ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN ARMED CONFLICT (Oxford University Press. 2014).p.135.
[519] Maarten den Heijer & Rick Lawson, *Extraterritorial Human Rights and the Concept of 'Jurisdiction'*, *in* GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW (Malcolm Langford, et al. eds., 2013).pp.182-183.
[520] Id, p.188.
[521] Alexander Orakhelashvili, *State Jurisdiction in International Law: Complexities of a Basic Concept*, *in* RESEARCH HANDBOOK ON JURISDICTION AND IMMUNITIES IN INTERNATIONAL LAW (Alexander Orakhelashvili ed. 2015).p.1.
[522] Fons Coomans, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights*, 11 HUMAN RIGHTS LAW REVIEW 1(2011).p.5.
[523] Rolf Künnemann, *Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights*, *in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno Kamminga eds., 2004).p.230.

the broad scope of obligations under the ICESCR always gives rise to an entitlement upon individuals.[524] Other human rights treaties use the term of jurisdiction (although there could have been a better word) to indicate a link between a State and an individual, due to which an entitlement is imperative. In addition, the Optional Protocol to the ICESCR also uses the term 'jurisdiction' to delimit the persons who can file an individual communication.[525] Using the same term to indicate an entitlement link under the ICESCR could first of all, maintain a unified approach to extraterritorial dimensions of human rights treaties, and second make the discussion of extraterritorial obligations more linked to entitlements of individuals.

Based on the idea that all human rights are indivisible, interdependent and interrelated,[526] this book aims to develop a unified approach to the scope of obligations under human rights treaties. On the one hand, it considers jurisdiction over individual victims as a link for entitlement. If a person falls within the jurisdiction of a home State, this person is entitled to the protection of his rights by the home State. On the other hand, a State's jurisdiction over an abuser triggers its due diligence obligations.

4.2. A Link for Entitlement: Individual Victims within the Jurisdiction of a Home State?

Are individual victims of a corporate human rights abuse in a host State within the jurisdiction of a home State for the purpose of invoking human rights treaties? The

[524] Claire Methven O'Brien, The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Case of Extraterritorial Overreach?, DIHR Matters of Concern Human Rights Research Papers No.2016/04, p.23.
[525] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Article 2.
[526] Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para.5. Christian Tomuschat, *Human Rights: Tensions Between Negative and Positive Duties of States*, 14 AUSTRIAN REVIEW OF INTERNATIONAL AND EUROPEAN LAW 19(2013).p.19. Craig Scott, *Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 OSGOODE HALL LAW JOURNAL 769(1989).p.771.

term 'jurisdiction' may have many meanings.[527] The ordinary meaning of jurisdiction is the authority of a court or official organization to make decisions and judgments.[528] In public international law, it has for a long time been used to indicate the legal competence of a State to make, apply and enforce rules of conduct upon persons.[529] When we interpret such a term under human rights treaties, we should also pay special attention to its context, relevant rules of international law, a treaty's object and purpose, subsequent practice, and we should interpret it in good faith.

The term 'jurisdiction' has been most frequently used in human rights treaties to identify whose rights a State shall ensure. In this regard, the meaning of jurisdiction in human rights law may be different from its meaning in public international law.[530] Even in public international law, the same person could be considered as falling within the jurisdiction of more than one State at the same time.[531] This makes individuals in a host State possibly within the jurisdiction of other States in parallel to the host State.[532] An object and purpose of the ICESCR is 'to promote universal respect for, and observance of, human rights' (from the preamble of the ICESCR). However, this object and purpose does not necessarily mean that a State shall ensure the rights of anyone in the world.

The last chapter has revealed that the ECtHR benchmark for jurisdiction (effective control over an area, or control over individuals) could not support home State

[527] GONDEK, supra note 66, p.47.
[528] Cambridge Dictionary (online edition), available at: http://dictionary.cambridge.org/dictionary/english/jurisdiction (last accessed 02-12-2015).
[529] Lowe & Staker, Jurisdiction. 2010. Supra note 333, p.313.
[530] GONDEK, The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties. 2009.p.369. Maarten den Heijer & Rick Lawson, *Extraterritorial Human Rights and the Concept of 'Jurisdiction'*, *in* GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW (Malcolm Langford, et al. eds., 2013).p.190.
[531] Alexander Orakhelashvili, *State Jurisdiction in International Law: Complexities of a Basic Concept*, *in* RESEARCH HANDBOOK ON JURISDICTION AND IMMUNITIES IN INTERNATIONAL LAW (Alexander Orakhelashvili ed. 2015).p.15.
[532] Todd Howland, *The Multi-State Responsibility for Extraterritorial Violations of Economic, Social and Cultural Rights*, 35 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 389(2007).p.408.

obligations over ordinary MNCs in general.[533] The HRC benchmark for jurisdiction (a link in the causal chain for extraterritorial violation) is more flexible than the ECtHR benchmark.[534] However, the causal chain is incomplete between a home State's failure to regulate and human rights abuses in a host State. Other factors are needed to complement the incomplete causal chain so as to prove the home State jurisdiction over individuals in a host State.[535] One may argue that State jurisdiction over a perpetrator automatically gives rise to jurisdiction over the victim for the purpose of seeking a remedy in accordance with the domestic law of that State. What if the domestic law of a home State cannot provide a remedy? Can the victim challenge the domestic law of the home State? A positive answer to the second question depends on a pre-existing jurisdiction over the individual victim, more than just jurisdiction over a perpetrator. How should we understand the notion of jurisdiction in the face of economic globalization and in the context of business and human rights? Do international investments add something new to the notion of jurisdiction in human rights law?

The international society has witnessed increasing interdependence, which calls for deeper international cooperation.[536] The idea of international cooperation has also been mentioned by some human rights treaties and State declarations.[537] Margot Salomon has argued that international cooperation, explicit or implicit in human rights treaties, implies shared responsibility of States.[538] The notion of shared responsibility has become more and more popular in both human rights and public international law discourse.[539] A home State and a host State may also have a

[533] Chapter 3, at 3.2.
[534] Chapter 3, at 4.3.2.
[535] Chapter 3, at 4.3.2.
[536] Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1(2002).p.92.
[537] The ICESCR, and the Convention on the Rights of the Child; Vienna Declaration and Program of Action.
[538] MARGOT SALOMON, GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS: WORLD POVERTY AND THE DEVELOPMENT OF INTERNATIONAL LAW (Oxford University Press. 2007).p.71.
[539] Todd Howland, *The Multi-State Responsibility for Extraterritorial Violations of Economic, Social and Cultural Rights*, 35 DENVER JOURNAL OF INTERNATIONAL

shared responsibility (at least morally) to prevent corporate human rights abuses. This trend should be taken into consideration when we interpret the term 'jurisdiction'.

Judge Loucaides has put forward a broad interpretation of jurisdiction in his partly dissenting opinion in the *Ilaşcu* case. He has pointed out that: 'A State may also be accountable under the Convention for failure to discharge its positive obligations in respect of any person if it was in a position to exercise its authority directly or even indirectly over that person or over the territory where that person is.'[540] According to Judge Loucaides, the meaning of jurisdiction should be determined on a case-by-case basis depending on which act is at stake.

Daniel Augenstein and David Kinley have argued that the (non-) regulation or control of corporate actors by a home State establishes a relationship of *de facto* power between the home State and the individuals whose rights are affected by those corporate actors in a host State.[541] They have pointed out that: 'A State's *de jure* authority to exercise extraterritorial jurisdiction under public international law … constitutes a *de facto* relationship of power of the State over the individual that brings the individual under the State's human rights jurisdiction and triggers corresponding extraterritorial obligations.'[542] Their argument is similar to the approach adopted by the Maastricht Principles, Principle 9(c) of which states that the scope of jurisdiction includes 'situations in which the State … is in a position to exercise decisive influence or to take measures to realize economic, social and

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LAW AND POLICY 389(2007).p.408. Andre Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 MICHIGAN JOURNAL OF INTERNATIONAL LAW 359(2013).p.367.

[540] The ECtHR, Ilaşcu and Others v. Moldova and Russia, Judgment of 8 July 2004, p.139.

[541] Daniel Augenstein & David Kinley, *When Human Rights 'Responsibilities' Become 'Duties': the Extra-Territorial Obligations of States That Bind Corporations*, *in* HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? (Surya Deva & David Bilchitz eds., 2013). p.285.

[542] Id.

cultural rights extraterritorially, in accordance with international law'.[543] The above interpretation corresponds to a moral argument that all States are trustees of humanity and that they are collectively required to protect everyone's human rights.[544] However, it remains unclear how far the proposed collective obligation has become a legal obligation.

According to the above interpretation, anyone could be within any State's jurisdiction. For example, a rich country has surplus food and it has authority (at least it is permitted under international law) to give food to people in a poor country. Can we say the rich country has an obligation to do so in the case of no commitment to other countries? [545] One may argue that the authority to do something cannot directly turn into an obligation to do the same. Besides, the above interpretation of jurisdiction makes it all-encompassing and it is contrary to the principle of interpretation in good faith.

If the above interpretation of jurisdiction is too broad, what is the appropriate interpretation of jurisdiction? The idea of jurisdiction in human rights law is to establish a relational link between a State and an individual for the purpose of securing the individual rights. One may argue that territory (either a State's own territory or the territory a State occupies) automatically gives rise to such a link.[546] The difficulty exists in the extraterritorial context: can we establish a link if a State does nothing? It is more reasonable to maintain that a certain degree of positive action of a State ex ante is required to establish the above link. For example, a State could be responsible for ordering, permitting or participating in the transfer of a person to the custody or control of an individual or institution known to have

[543] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, available at: http://www.etoconsortium.org/en/library/maastricht-principles/ (last accessed 23-07-2014).
[544] Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 American Journal of International Law 295 (2013).p.307.
[545] If a rich country commits itself to donating to other countries, it is bound by the commitment.
[546] MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (Oxford University Press. 2011), p.210.

engaged in torture or ill-treatment.[547] In this situation, a State has taken positive actions (for example preliminary investigation or apprehension) before making a decision of transfer. In the context of business and human rights, can we find the positive action of a home State ex ante?

Present-day conditions for interpreting jurisdiction have been changed by international investments which are booming in the era of economic globalization. A home State's revenue could increase due to tax paid by MNCs for their overseas business.[548] Although individuals located in a host State are not physically linked to a home State, their contribution (such as labor and environment) at least indirectly enriches a home State. Could individuals located in a host State fall within the jurisdiction of a home State for the purpose of human rights law in light of present-day conditions? A home State usually pays attention to the protection of its overseas investments through investment agreements with a host State.[549] We could argue that concluding an investment agreement is a positive action ex ante that brings individuals in a host State within the jurisdiction of a home State for the purpose of invoking the obligation to protect and in relation to the impacts of investment agreement on the host State's regulatory capacity.

In recent decades, international investment law has been prosperous. A home State tends to conclude a Bilateral Investment Treaty (BIT) or other international investment agreement with a host State to protect investments made by the nationals of the home State. The number of international investment agreements continues to grow and, by the end of 2015, there were at least 3,304 agreements (2,946 BITs and 358 treaties with investment provisions) worldwide.[550] Some researchers have revealed that BITs have placed restrictions on the regulatory space

[547] Committee against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2, para.19.
[548] ROBERT DUNN & JOHN MUTTI, INTERNATIONAL ECONOMICS (Routledge Sixth ed. 2004). p.217.
[549] Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 621(1998).p.635.
[550] United Nations Conference on Trade and Development, World Investment Report 2016, p.101.

of a host State.[551] Over the last two decades, government regulatory measures of host States in the areas of health, safety and the environment have been the subject of challenges by private corporations in accordance with international investment agreements.[552] The Investor-State dispute settlement arrangement contained in many international investment agreements is facing a crisis of legitimacy in that developed countries attempt to impose their power on developing countries through the provisions of their BITs.[553] Some even argue that investor-State arbitration has created 'regulatory chill': host States will refrain from or alter legitimate legislation and regulation for fear of costly investment arbitration.[554]

Although regulatory chill is difficult to prove or disprove,[555] and there is even an empirical research disproving such a phenomenon,[556] the international investment agreements and Investor-State Dispute Settlement they create have great potential to limit a host State's regulatory capacity. For example, protection against indirect expropriation has been included in most international investment agreements. Many of them adopt a broad definition of indirect expropriation and remain silent on the treatment of the non-compensable regulatory measures.[557] It may result in a

[551] Lorenzo Cotula, *Do Investment Treaties Unduly Constrain Regulatory Space?*, 9 QUESTIONS OF INTERNATIONAL LAW 19(2014). p.20.
[552] Christine Côté, A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment (2014) The London School of Economics and Political Science, PhD thesis, p.20.
[553] Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHICAGO JOURNAL OF INTERNATIONAL LAW 471(2009). p.474.
[554] Rosalien Diepeveen, et al., *"Bridging the Gap between International Investment Law and the Environment", 4th and 5th November, The Hague, The Netherlands*, 30 UTRECHT JOURNAL OF INTERNATIONAL AND EUROPEAN LAW 145(2014). p.159.
[555] Christian Tietje, Freya Baetens, The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic
Trade and Investment Partnership, Study Report for Minister for Foreign Trade and Development Cooperation, and Ministry of Foreign Affairs of the Netherlands, 2014. p.9.
[556] Christine Côté, A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment (2014) The London School of Economics and Political Science, PhD thesis, p.187.
[557] OECD, 'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law, OECD Working Papers on International Investment 2004/04, p.6.

situation where the host State measures that harm an investor can be considered indirect expropriations, regardless of the reasons that underlie such measure.[558]

An empirical research shows that investment arbitration has been used, until the mid-to-late 1990s, as a sword in the hands of the economic interests of investors from rich countries against governments of poorer countries, but has since then also been used significantly by investors from rich countries against other rich governments.[559] Investment agreement and investment arbitration could restrict the regulatory capacity of a host State to different extents. If a home State makes a host State's regulatory measures completely or partly impossible through international investment law practice, the individuals located in a host State arguably fall within the jurisdiction of the home State for the purpose of seeking a regulation on investments from the home State. Such an interpretation of jurisdiction keeps a balance between human rights protection and legal certainty. On the one hand, it could fill in the regulatory gap created by economic globalization. On the other hand, it will not overly enlarge the meaning of jurisdiction.

There is indeed a trend that international investment law begins to admit the host State's right to regulate investments. For example, the US model BIT (both the 2004 edition and 2012 edition) has confirmed that non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.[560] In 2012, the UNCTAD advocated 'new generation' investment policies in its Investment Policy Framework for Sustainable

[558] Suzy H. Nikièma, Best Practices: Indirect Expropriation, report of the International Institute for Sustainable Development, 2012, p.3.
[559] Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study*, 25 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1147(2015). p.1149.
[560] 2012 U.S. Model Bilateral Investment Treaty, Annex B, available at: https://www.state.gov/documents/organization/188371.pdf (last accessed 19-09-2016). 2004 U.S. Model Bilateral Investment Treaty, Annex B, available at: https://www.state.gov/documents/organization/117601.pdf (last accessed 19-09-2016).

Development (IPFSD).[561] The IPFSD encourages future BITs to clarify that the investor protection objectives shall not override host States' rights to regulate in the public interest as well as with respect to certain important policy goals including the protection of human rights.[562] A recent development is the European Union's proposal for the investment chapter in Transatlantic Trade and Investment Partnership (TTIP). The European Union's proposal has stated that:

> The provisions of this section shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity.[563]

However, although there are more and more rules admitting host State's rights to regulate, a host State's regulatory power may remain heavily influenced by investor-State dispute settlements.[564] Another scholar has also pointed out that simply recognizing a host State's sovereign right to regulate may not be sufficient to address the problem caused by the definition of indirect expropriation.[565]

It is submitted that individuals located in a host State are generally within the jurisdiction of the host State. At the same time, they can fall within the jurisdiction of a home State in proportion to the extent that a home State has limited the regulatory power of a host State through international investment law practice. The advantage of such an interpretation of jurisdiction is that, first of all, it takes into consideration relevant rules of international law (Article 31(3)(c) of the VCLT) --

[561] United Nations Conference on Trade and Development, World Investment Report 2012, p.xii.
[562] Id, p.144.
[563] European Commission draft text TTIP, Chapter II – Investment, Article 2, http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (last accessed 19-02-2017).
[564] Christiane Gerstetter, Nils Meyer-Ohlendorf, Investor-state dispute settlement under TTIP – a risk for environmental regulation? Report of the Ecologic Institute, 2013, p.15.
[565] Suzy H. Nikièma, Best Practices: Indirect Expropriation, report of the International Institute for Sustainable Development, 2012, p.21.

rules of international investment law-- when interpreting the term 'jurisdiction'. Second, it has not made the term 'jurisdiction' meaningless, as is done by some scholars.[566] The disadvantage of such an interpretation of jurisdiction is that it is difficult to measure the extent of limitation on regulatory power of a host State through international investment law practice. A case-by-case analysis of the factual background is always necessary. However, it is difficult to put forward a clear-cut benchmark and more quantitative research is needed in the future to develop an economic model.

The above interpretation of jurisdiction may also be strengthened by the interplay of human rights jurisprudence and public international law jurisprudence. Alex Mills has argued that the notion of jurisdiction in international law should be rethought as concerned not only with State rights but also with State responsibilities in light of developments in some branches of international law, particularly human rights law.[567] Indeed, there is increasing recognition in international law that States may owe obligations to exercise prescriptive and particularly adjudicative jurisdiction directly to individuals.[568] In this sense, the functional approach of jurisdiction is reasonable.[569] The interpretation of jurisdiction proposed in this chapter is specially applied to the obligation to protect, and it does not mean that the individuals in a host State are necessarily within the jurisdiction of a home State for the obligation to fulfil (it may be possible according to other criterion, but this is beyond this book's topic).

[566] Augenstein & Kinley, When Human Rights 'Responsibilities' Become 'Duties': the Extra-Territorial Obligations of States That Bind Corporations. 2013. p.285.
[567] Alex Mills, *Rethinking Jurisdiction in International Law*, 84 BRITISH YEARBOOK OF INTERNATIONAL LAW 187(2014).p.235.
[568] Id.
[569] See the last chapter, at section 2.

5. State's Due Diligence Obligations: A Territorial Regulation Approach

This section provides another approach to justifying home State obligations. If individuals located in a host State are not within the jurisdiction of a home State (in case the above interpretation of jurisdiction is not accepted), the home State still has a due diligence obligation to prevent companies which are registered or domiciled or which have main place of business in its territory (sometimes referred to as corporate nationals[570]) from abusing human rights abroad.[571] In recent decades, many fields of international law have seen the emergence of primary obligations that require States to exercise due diligence.[572] The concept of due diligence in international law usually refers to State obligations to prevent private persons within its territory or jurisdiction from breaching international law.[573] State obligations of due diligence have expanded to the field of human rights law.[574] It relates to States' positive obligations to take preventive measures to reduce or eliminate human rights violations committed by non-State actors.[575] In the discourse of business and human rights, the headquarters of an MNC are within the jurisdiction of a home State and therefore a home State due diligence obligations

[570] The nationality of a company is referred to very often in private international law and international investment law. Under public international law, this topic is only touched upon on special occasions such as in relation to diplomatic protection (the ICJ *Barcelona Traction* Case). Public international law does not have a unified standard to determine the nationality of a company. The corporate nationality is subject to domestic law. The incorporation test is typical of the common law countries and the seat test is dominant in civil law countries. See Peter Muchlinski, Corporations in International Law, in Max Planck Encyclopedia of Public International Law, June 2014, para.24. Since this book deals with regulative obligations, corporate nationals of a State refer to companies which are registered, domiciled or have their main place of business in this State. It depends on a State to decide the scope of companies to be regulated according to at least one of the three criteria.

[571] Vassilis P. Tzevelekos, *In Search of Alternative Solutions: Can the State of Origin Be Held Internationally Responsible for Investors' Human Rights Abuses that Are Not Attributable to It?*, 35 BROOKLYN JOURNAL OF INTERNATIONAL LAW 155(2010).p.227.

[572] Timo Koivurova, Due Diligence, in Max Planck Encyclopedia of Public International Law, February 2010, para.3.

[573] Id, para.46.

[574] Id, para.33.

[575] Elif Askin, Due Diligence Obligation in Times of Crisis: A Reflection by the Example of International Arms Transfers, EJIL: Talk! (1 March 2017).

are triggered. The State due diligence obligation under human rights treaties can be justified by way of the treaty interpretation method. The following part shows that a home State due diligence obligations derive from an interpretation of human rights treaty provisions in a synthetic consideration of ordinary meaning, relevant rules of international law, and subsequent practice.

5.1. Ordinary Meaning and Relevant Rules of International Law: International Cooperation

Article 2(1) of the ICESCR contains the phrase 'international assistance and cooperation'. The term 'cooperation' itself indicates the measures to be taken for positive purposes, for example to promote human rights. No one can claim that States could cooperate to violate human rights or to shirk responsibility. In the context of business and human rights, a host State and a home State should cooperate to promote human rights rather than shirking their responsibilities. It is arguable that the failure of a home state to prevent a transnational corporation from committing human rights abuses in another State would be contrary to the obligation of international cooperation as laid down in Article 2(1) of the ICESCR.[576] Therefore, home States should at least do something positive to contribute to international cooperation.

When interpreting the human rights treaties which do not contain the language of international cooperation, Article 2(1) of the ICESCR and other international law rules containing such language could function as 'relevant rules of international law' (Article 31(3)(c) of the VCLT).[577] In addition to Article 2(1) of the ICESCR, the obligation of international cooperation can be also found in Article 56 of the UN Charter and Article 22 of the Universal Declaration of Human Rights.[578] Furthermore, international cooperation has a considerably broad scope of

[576] Fons Coomans, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights*, 11 HUMAN RIGHTS LAW REVIEW 1(2011). p.31.
[577] Supra note 329.
[578] Some scholars have argued that the whole or at least a part of provisions in the Universal Declaration of Human Rights have become customary international law. Supra note 18.

application in international law, which is highlighted by the multitude of soft law documents (such as the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the Declaration on the Right to Development and the United Nations Millennium Declaration). The general obligation of international cooperation is still under development in general international law.

Human rights treaty bodies have already taken into account of the obligation of international cooperation when interpreting treaty provisions. For example, the CESCR has frequently stressed that international cooperation and assistance are crucial for the realization of the ESC right.[579] The Committee on the Rights of the Child has articulated that the host and home States of business enterprises should cooperate to protect human rights.[580] Human rights practice has indicated that a home State has an obligation to cooperate with a host State to protect human rights.

5.2. Relevant Rules of International Law: General International Law Obligation Not to Cause Damage in Other Countries

The general international law obligation not to cause damage in other countries is the most powerful evidence of the State due diligence obligation. This rule was originally formulated in the field of environmental protection through the well-known *Trail Smelter Arbitration* case.[581] Afterwards, the ICJ enlarged the scope of its application to general international law in the *Corfu Channel* case.[582] In the *Nuclear Weapon Advisory Opinion*, the ICJ has clarified that such a rule has

[579] The CESCR, General Comment No. 12, 14, 15, 22, 23.
[580] The Committee on the Rights of the Child, General Comment No. 16 (2013) on State Obligations regarding the Impact of the Business Sector on Children's Rights, CRC/C/GC/16, 17 April 2013, Part V(C).
[581] The Trail Smelter Case (United States, Canada), 16 April 1938 and 11 March 1941, in UN Reports of International Arbitral Awards, Volume III, p.1965.
[582] The International Court of Justice, Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of 9 April 1949, p.22.

become customary international law.[583] It has been well established that States should control activities within their territory.[584] This idea has been confirmed by several legally binding treaties: the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972 London Convention), the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. When we interpret human rights treaty provisions, such a general international law obligation should be taken into consideration. In doing so, it is submitted that a State has an obligation to prevent activities within its own territory or jurisdiction from damaging human rights abroad. To be specific, a home State should take due diligence measures to ensure that multinational corporations within its territory respect human rights in other countries.

Such an obligation is a State obligation vis-à-vis another State in essence. However, it is still relevant for the interpretation of human rights treaties. First, a State obligation vis-à-vis another State has the potential to give rise to an individual right. Consular protection is a good example. In public international law, consular protection is usually considered a State obligation vis-à-vis another State. Nevertheless, in the *LaGrand* case the ICJ has confirmed that Article 36(1) of the Vienna Convention on Consular Relations created individual rights.[585] Although whether those rights can be enforced before a domestic court or an international court may be debatable,[586] the Vienna Convention on Consular Relations itself has been considered to give rise to individual rights.[587] By the same token, home State obligations on the basis of no harm principles may arguably create individual rights,

[583] The International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, para.29.
[584] Jan Arno Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITIC 265(2004).p.270.
[585] The ICJ, the LaGrand (Germany v. United States of America) case, Judgment of 27 June 2001, para.89. Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 798(2002).p.814.
[586] Carsten Hoppe, *Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights*, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 317(2007).p.333.
[587] The ICJ, Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment of 31 March 2004, para.140.

at least when a minimum standard of such obligations can be inferred.[588] Second, even if home State obligations derived from no harm principles may not be directly invoked by individuals, these obligations can be addressed through international cooperation.

5.3. Subsequent Practice on Home State's Due Diligence Obligations

Article 31(3)(b) of the VCLT makes a dynamic interpretation possible. This provision refers to subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.[589] It is unpractical for all State parties to a multilateral treaty (particularly a human rights treaty which mainly deals with vertical relationships) to participate in and reach an agreement on a specific practice. There is no clear answer to the question of how many States must participate in a practice or how many persistent objectors are sufficient for denying new tendencies.[590] It is gradually accepted that a tacit acceptance of a practice is sufficient to provide a basis for interpretation.[591] The following part shows that due diligence measures are emerging in some home States. This chapter acknowledges that it is hard to prove a tacit agreement among State parties to a certain human rights treaty, but the following practices at least indicate a new tendency of due diligence obligations, which should be duly considered by an interpreter. As relevant rules of international law have already endorsed the notion of due diligence obligations,[592] the content of which is still vague, an analysis of domestic practice of home States may help to induce a minimum standard for home State due diligence obligations.

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[588] See below 5.3.1.
[589] Vienna Convention on the Law of Treaties, Article 31(3)(b).
[590] Rudolf Bernhardt, *Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 GERMAN YEARBOOK OF INTERNATIONAL LAW 11(1999).p.22.
[591] HANNEKE SENDEN, INTERPRETATION OF FUNDAMENTAL RIGHTS IN A MULTILEVEL LEGAL SYSTEM (Intersentia. 2011). p.151.
[592] See the last section, at 5.2.

A number of States have already taken due diligence measures to prevent multinational corporations headquartered in their territory from abusing human rights abroad. For example, Norway has passed legislation to prevent *the Government Pension Fund Global* from investing in any corporation that contributes to or is responsible for human rights violations.[593] The UK has adopted the Modern Slavery Act 2015, which requires certain corporations (that have a total turnover of not less than an amount prescribed by regulations made by the Secretary of State) which carry on a business, or part of a business, in any part of the United Kingdom to prepare a slavery and human trafficking statement for each financial year.[594] A slavery and human trafficking statement for a financial year is 'a statement of the steps the organization has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains, and in any part of its own business' or 'a statement that the organization has taken no such steps'.[595] The US Department of the Treasury requires any US person (both individuals and entities) investing over $500,000 in Myanmar to provide to the State Department the information set forth in the State Department's Reporting Requirements on Responsible Investment in Myanmar.[596] The report should include information regarding policies and procedures with respect to human rights, workers' rights and environmental stewardship.[597]

A popular initiative (the Responsible Business Initiative) was launched in 2015 in Switzerland to protect human rights and environment by establishing a mandatory due diligence process for Swiss based companies in all their operations (including

[593] See Norway, Guidelines for Observation and Exclusion from the Government Pension Fund Global, Adopted 18 December 2014 by the Ministry of Finance pursuant to the Royal Decree of 19 November 2004 and section 2, second paragraph, and section 7 of Act No.123 of 21December 2005 relating to the Government Pension Fund, available at: http://etikkradet.no/en/guidelines/ (last accessed 23-2-2016).
[594] See the UK, the Modern Slavery Act 2015, Article 54, available at: http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf (last accessed 1-2-2016).
[595] Id.
[596] The US Department of the Treasury, Reporting Requirements on Responsible Investment in Burma, available at: https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20120711.aspx (last accessed 12-11-2016).
[597] Id.

overseas business).[598] A popular initiative allows Swiss citizens to request an amendment to the Federal Constitution.[599] The Swiss Responsible Business Initiative demands the introduction of Article 101a 'Responsibility of Business' in the Constitution.[600] Under the Responsible Business Initiative, companies will be legally obliged to incorporate respect for human rights and the environment in all their business activities. This mandatory due diligence will also be applied to Swiss based companies' activities abroad.[601] The Responsible Business Initiative was officially submitted in October 2016 after it gathered 120,000 signatures – 100,000 are required for an initiative in Switzerland.[602]

Another example of a home State acting with due diligence to regulate corporate conduct abroad is to allow civil litigations against subsidiaries registered in a host State before the court of a home State. Access to remedy is an important aspect of home State regulations.[603] Some European countries have adopted the principle of *forum necessitatis* (jurisdiction of necessity) to ensure access to remedy. *Forum necessitatis* demands that the State to which a plaintiff appeals provide access to court where no other forum is available.[604] Research shows that at least 10 Member States of the EU have accepted *forum necessitatis* principle based on an explicit statutory provision or on case law.[605] States that have accepted the *forum*

[598] Swiss Coalition for Corporate Justice, The Responsible Business Initiative: protecting human rights and the environment, available at: http://konzern-initiative.ch/initiativtext/?lang=en(last accessed 2-2-2017).
[599] Id.
[600] Id.
[601] Id.
[602] Swiss Coalition for Corporate Justice, Swiss quality must include the protection of human rights and the environment, available at: http://konzern-initiative.ch/swiss-quality-must-include-the-protection-of-human-rights-and-the-environment/?lang=en (last accessed 2-2-2017).
[603] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, available at: http://www.etoconsortium.org/en/library/maastricht-principles/ (last accessed 23-07-2014). Principle 27.
[604] Stephanie Redfield, *Searching for Justice: The Use of Forum Necessitatis*, 45 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 893(2013). p.906.
[605] Arnaud Nuyts, Study on Residual Jurisdiction (Review of the Member States' Rules concerning the 'Residual
Jurisdiction' of Their Courts in Civil and Commercial Matters Pursuant to the Brussels I and II Regulations): General Report, 3 September 2007, available at:

necessitatis principle include: Austria, Belgium, Estonia, Netherlands, Portugal, Romania (statutory based), and France, Germany, Luxembourg, Poland (case law based).[606] The principle of *forum necessitatis* makes litigation against a subsidiary registered in a host State possible before the court of a home State, if the victim could prove a denial of access to court in the host State.

The Dutch courts have allowed corporate victims in a host State to sue a parent company (domiciled or headquartered in the Netherlands) and its subsidiary abroad together, even without reference to the *forum necessitatis* principle. In several cases, Dutch courts have established jurisdiction over lawsuits filed by Nigerian victims against Royal Dutch Shell (a parent company, RDS) and Shell Petroleum Development Company of Nigeria (a subsidiary incorporated in Nigeria, SPDC).[607] The Shell Group, a multinational corporation headquartered in The Hague (Netherlands), is one of the oil companies that have been active in Nigeria for years.[608] The *Friday Alfred Akpan v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria* case involves two specific oil spills in 2006 and 2007 from oil facilities of SPDC in Nigeria where the plaintiff lives.[609] The court has established its jurisdiction over both RDS and SPDC by reference to Article 2(1) of the Brussels I Regulation in conjunction with Article 7(1) of the Dutch Code of Civil Procedure (multiple defendants).[610]

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http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf (last accessed 15-4-2016). p.64.

[606] Id, p.66.

[607] Nicola Jägers, Katinka Jesse, Jonathan Verschuuren, The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case Against Shell, American Journal of International Law Unbound, 2014 January, p.36.

[608] District Court of the Hague, Friday Alfred Akpan v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria, 30 January 2013. Original judgment is available at: http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2013:BY9854 (last accessed 20-4-2016). English translation is available at: https://milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-akpan-vs-shell-oil-spill-ikot-ada-udo/view (last accessed 20-4-2016). para.2.1.

[609] Id, para.2.4.

[610] Id, para.4. Article 2(1) of the Brussels I Regulation provides that: 'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in

In the discourse of business and human rights, an important question is whether a parent company in a home State is responsible for the conduct of its subsidiary in a host State. The recent UK tort law practice has indicated that a parent company could be responsible for the conduct of its subsidiary without piercing the corporate veil, because a parent company owes a duty of care to the victim of its subsidiary's tort. In the *Chandler v Cape plc* case, the Claimant was employed by a company known as Cape Building Products Ltd (the subsidiary in this case) between 22 April 1959 and 9 October 1959 and between 24 January 1961 and 9 February 1962.[611] During the course of his work, he was exposed to asbestos dust.[612] In 2007 the Claimant discovered that he had contracted asbestosis as a consequence of that exposure.[613] At that time, Cape Products (the subsidiary) had long since ceased to exist. The Claimant filed a claim against the Defendant (the parent company of Cape Building Products Ltd). The Claimant submitted that the parent company owed to him a duty of care.[614] The court of first instance considered it fair, just and reasonable to impose a duty of care on the parent company.[615] In the appeal stage of the *Chandler* case, the appeal court further developed the criteria for parent company's responsibility.[616]

China has also taken due diligence measures to regulate its overseas investments, which will be discussed in the Sixth Chapter. In short, many home States have realized that they should at least take some due diligence measures to regulate companies based in their territory for their extraterritorial human rights impacts.

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the courts of that Member State.' Article 7(1) of the Dutch Code of Civil Procedure provides that: 'If legal proceedings are to be initiated by a writ of summons and a Dutch court has jurisdiction with respect to one of the defendants, then it has jurisdiction as well with respect to the other defendants who are called to the same proceedings, provided that the rights of action against the different defendants are connected with each other in such a way that a joint consideration is justified for reasons of efficiency.'

[611] UK High Court of Justice Queen's Bench Division, David Brian Chandler v. Cape Plc, [2011] EWHC 951 (QB), para.1.

[612] Id, para.4.

[613] Id, para.5.

[614] Id, para.7.

[615] Id, para.76.

[616] UK Court of Appeal (Civil Division), David Brian Chandler v. Cape Plc, [2012] EWCA Civ 525, para.80.

Home State practice on due diligence measures is still expanding.[617] A minimum standard of due diligence measures may be induced from the above account of State practice. The minimum standard for a home State is mainly procedural obligations in nature: for example to require an MNC headquartered therein to release information on their impacts on human rights extraterritorially, or to adjudicate the civil litigation filed by victims in good faith and with due regard to human rights.[618] This minimum standard is induced from the current State practice, and this book acknowledges that it may be subject to the defect of insufficient samples. To sum up, home State due diligence measures have become a new tendency.

5.4. Some Remarks on a Home State's Due Diligence Obligation

In addition to conforming to the ordinary meaning, relevant rules of international law and subsequent practice, a home State's due diligence obligation is also in conformity with the object and purpose of human rights treaties, namely 'to promote universal respect for, and observance of, human rights'. Therefore, a home State's due diligence obligation could be justified through the treaty interpretation method. This approach requires home States to take measures within their own territory with regard for the extraterritorial effects on human rights by investments from their own territory. In this sense, the UNGP is misleading in stating that: 'At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.'[619] The home State's due diligence obligation remains a useful

[617] Business and Human Rights Resource Center, Examples of government regulations on human rights reporting & due diligence for companies, https://business-humanrights.org/en/examples-of-government-regulations-on-human-rights-reporting-due-diligence-for-companies (last accessed 1-3-2017).
[618] Supra note 594. Supra note 608.
[619] United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, HR/PUB/11/04, 2011, commentary to Principle 2.

approach for the discourse of business and human rights, which has been supported by several scholars.[620]

A small group of scholars is pessimistic about the home State due diligence obligations. John Ruggie has generally denied home State obligations and he has only admitted that 'there are strong policy reasons for home states to encourage their companies to respect rights abroad'.[621] His argument was based on his observation of human rights treaty body practice before 2009.[622] However, human rights treaty bodies have been more active in promoting home State obligations since then and they have clarified home State due diligence obligations.[623] The opposition to home State due diligence obligations is less than before. Olivier De Schutter has pointed out that the due diligence approach will not raise the question of extraterritoriality: certain obligations are imposed on a parent corporation by the State of which it has the 'nationality' (or where it is domiciled), and the impacts on situations located outside the national territory are merely indirect.[624]

The home State's due diligence obligation is mainly derived from the State obligation vis-à-vis other States. However, this approach still makes sense. It can be at least addressed on multilateral levels, for example, before State reporting procedures or inter-State complaints of treaty bodies and even before the UN Human Rights Council. Inter-State complaints have not been used so far before

[620] Robert McCorquodale, *Spreading Weeds beyond their Garden: Extraterritorial Responsibility of States for Violations of Human Rights by Corporate Nationals* 100 Proceedings of the Annual Meeting (American Society of International Law) 95(2006).p.101. McCorquodale & Simons, MODERN LAW REVIEW, (2007). p.618. Vassilis P. Tzevelekos, *In Search of Alternative Solutions: Can the State of Origin Be Held Internationally Responsible for Investors' Human Rights Abuses that Are Not Attributable to It?*, 35 Brooklyn Journal of International Law 155(2010).p.230.
[621] Ruggie, AMERICAN SOCIETY OF INTERNATIONAL LAW: PROCEEDINGS OF THE ANNUAL MEETING 2009, (2009). p.283.
[622] Id.
[623] See Chapter 5.
[624] Olivier De Schutter, *Towards a New Treaty on Business and Human Rights*, 1 BUSINESS AND HUMAN RIGHTS JOURNAL 41(2016). p.47.

human rights treaty bodies.[625] State reporting procedures of treaty bodies and the universal periodic review (the UPR) of the UN Human Rights Council have already monitored home State due diligence obligations. For instance, in the UPR before the UN Human Rights Council, Egypt has suggested that Canada 'continue efforts towards the establishment and implementation of an effective regulatory framework for holding companies registered in Canada accountable for the human rights impact of their operations'.[626]

Under the due diligence approach, a home State has the discretion to choose regulatory measures: from requiring a company to report its extraterritorial activities, to providing a victim access to justice by hearing a civil lawsuit against a subsidiary in a host State, and to imposing a duty of care on a parent company for its subsidiary abroad.[627] However, it is hard to assess when a home State has breached its due diligence obligation. Elif Askin has pointed out that the due diligence obligation provides States with flexibility in meeting their international human rights obligations.[628] For the time being, the proportionality principle could be borrowed to measure the breach of due diligence obligations. Laurens Lavrysen has proposed that a breach of positive obligation should be judged in accordance with the proportionality principle in general.[629] According to this idea, a State may enjoy some leeway in choosing the means to discharge due diligence obligations, but the protection offered must be effective and in compliance with the proportionality principle.[630] In addition, although due diligence obligations are

[625] See the website of The Office of the United Nations High Commissioner for Human Rights, available at: http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#interstate (last accessed 11-4-2016).
[626] The UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Canada, A/HRC/24/11, 28 June 2013, para.128.151.
[627] Supra note 594, Supra note 607, Supra note 616.
[628] Elif Askin, Due Diligence Obligation in Times of Crisis: A Reflection by the Example of International Arms Transfers, EJIL: Talk! (1 March 2017).
[629] LAURENS LAVRYSEN, HUMAN RIGHTS IN A POSITIVE STATE: RETHINKING THE RELATIONSHIP BETWEEN POSITIVE AND NEGATIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Intersentia. 2016).p.332.
[630] Id.

context-dependent, there might be due diligence obligations for which the same standard is required of all States regardless of their particular level of development.[631] Therefore, a home State could breach its due diligence obligation either by violating the minimum standard,[632] or by failing to discharge such an obligation in accordance with the proportionality principle. The positive aspect of such a due diligence approach is to gain consensus among home States for the future negotiation of a legally binding instrument.[633] An explicit benchmark for home State regulation (an explicit minimum standard) is greatly needed in the future legally-binding instrument on business and human rights.

6. Extraterritorial Obligation to Respect Human Rights

This chapter takes the same approach to State obligations to respect human rights as the last chapter. It is submitted that a State should respect everyone's rights no matter where the person is.[634] A home State's extraterritorial obligation to respect human rights is at issue when the conduct of a State-owned corporation is attributed to it.[635] This book has argued that the conduct of a State-owned corporation could be attributed to the State which has a majority ownership in the corporation.[636] However, there is a legal gap regarding the benchmark for a breach of the extraterritorial obligation to respect human rights when a State engages in commercial activities such as investments in a host State. Can we say that there is a

[631] Elif Askin, Due Diligence Obligation in Times of Crisis: A Reflection by the Example of International Arms Transfers, EJIL: Talk! (1 March 2017).
[632] See previous section 5.3.1.
[633] The UN Human Rights Council, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, A/HRC/RES/26/9, 14 July 2014, para.1.
[634] Vassilis P. Tzevelekos, *Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility*, 36 MICHIGAN JOURNAL OF INTERNATIONAL LAW 129(2014).p.147. MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (Oxford University Press. 2011).p.209.
[635] Vassilis P. Tzevelekos, *In Search of Alternative Solutions: Can the State of Origin Be Held Internationally Responsible for Investors' Human Rights Abuses that Are Not Attributable to It?*, 35 BROOKLYN JOURNAL OF INTERNATIONAL LAW 155(2010).p.222.
[636] Chapter 2, at 5.3.

breach of a State obligation if a State-owned corporation of a home State negatively affects human rights in a host State?

The International Law Commission has argued that commercial activities may not influence attribution issues (at least for Article 4) but they may cause a difficulty in determining a breach of international obligations.[637] Public international law remains silent on the breach of international obligations by State commercial activities and it tends to turn this issue into a private international law matter. For example, Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property (not yet in force) has subjected 'compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to a State' to the jurisdiction of a court of another State where the act or omission occurred.[638] As the distinction between public and private has become blurred in international law,[639] is it possible that the obligation to respect human rights could be breached by State commercial activities?

The answer to the above question is determined by the language of treaty provisions and the content of a specific right. Some provisions of the ICESCR are concerned with governmental authority or welfare issues, and they cannot be violated by a home State through its State-owned corporations abroad. For example, Article 13(2) mentions State obligation to provide primary and secondary education.[640] This provision has little relevance to a home State obligation to respect. However, there are indeed some provisions concerning a home State obligation to respect, because of their inclusive language. The following provisions can be violated by a State-owned corporation of a home State: Article 7(b), Article 8(1)(a), Article 9, Article 10(2), Article 11(1), Article 12(1). If the working conditions are unsafe in a State-

[637] International Law Commission, Responsibility of States for Internationally Wrongful Acts, in Yearbook of the International Law Commission, 2001, vol. II (Part Two), p.41.
[638] United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004, A/59/508.
[639] Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 387(1999).p.389.
[640] The ICESCR, Article 13(2).

owned corporation, for instance, the home State may breach its obligation to 'recognize the right of everyone to the enjoyment of just and favorable conditions of work' under Article 7.[641] If a State-owned corporation pollutes the local environment, for another instance, the home State may breach its obligation to 'recognize the right of everyone to an adequate standard of living' under Article 11(1).[642]

The Committee on Economic, Social and Cultural Rights has indicated that State's commercial activities could give rise to a breach of State obligation under human rights treaties. It has asserted that: 'States parties must refrain from acts or omissions that interfere, either directly or indirectly, with the realization of the right to just and favorable conditions of work in other countries. This is particularly relevant when a State party owns or controls an enterprise or provides substantial support and services to an enterprise operating in another State party.'[643] However, it is unclear when the right to just and favorable conditions of work (or other rights) is violated by a home State's commercial activities (investments in a host State). To judge a breach of State obligations to respect human rights in the context of commercial activities would finally become a matter of fact.

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (a law restatement) may provide some basic principles.[644] According to these guidelines, the obligations to respect, protect and fulfill each contain elements of obligations of conduct and obligations of result.[645] The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular

[641] The ICESCR, Article 7.
[642] The ICESCR, Article 11(1).
[643] Committee on Economic, Social and Cultural Rights, General Comment No 23: on the right to just and favorable conditions of work, 27 April 2016, E/C.12/GC/23, para.69.
[644] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997, available at: http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/TextsAdoptedByTheCentre.htm (last accessed 26-10-2015).
[645] Id, para.7.

right.[646] The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard.[647] Furthermore, any discrimination on grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of human rights constitutes a violation of relevant human rights treaty.[648] Based on these principles, several examples of breaches of State obligations to respect human rights through the conduct of State-owned corporations could be envisaged. If a State-owned corporation in a host State employs a child of an age below the minimum for child labor provided by either the host State or the home State, the home State would breach its obligation to respect Article 10 of the ICESCR. If the working conditions of a State-owned corporation in a host State are manifestly lower than those required in the home State of the corporation, the home State may breach its obligation to respect Article 7 of the ICESCR. If a State-owned corporation in a host State purposely takes discriminative measures against employees from its home State and employees from the host State, the home State may breach its obligation to respect the relative human right at issue.

In conclusion, there is a possibility for a home State to breach its obligation to respect human rights through the conduct of its State-owned corporations that are attributed to it. If a home State denies the abuse of a State-owned corporation which is based on preliminary evidence, an obligation is attached to the home State to investigate the situation.[649] Therefore the extraterritorial obligation to respect human rights will immediately impose the burden of investigation on the home State which denies a certain abuse of human rights based on preliminary evidence.

[646] Id.
[647] Id.
[648] Id, para.11.
[649] Chapter 3, at 4.3.2.

7. Conclusion

Unlike the ICCPR, the ICESCR does not contain the language of 'State undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'. At this point, the obstacle for deriving home State obligations from the ICESCR is less than that from the ICCPR. It is arguable that a State should respect everyone's rights no matter where the person is.[650] In this sense, when a corporate human rights abuse takes place and such an abuse is directly attributed to a home State, the home State should be directly responsible for the abuse. However, the situation is different for positive obligations. This book takes a cautious approach that State parties have not intended to ensure the rights recognized in the ICESCR for all individuals in the world.[651] A benchmark is needed to identify whose rights a State shall ensure.

The term 'jurisdiction' has been most frequently used by human rights treaties to identify whose rights a State shall ensure. Such treaties include the ECHR, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the American Convention on Human Rights. The optional protocol to the ICESCR also uses the term 'jurisdiction' to indicate the persons who can file an individual communication to the CESCR. In public international law, the word 'jurisdiction' is usually linked to a perpetrator or a person to be regulated.[652] Sometimes, human rights treaties also use the term in this sense. For example, Article 9 of the International Convention for the Protection of All Persons from Enforced Disappearance states that: 'Each State Party shall take the necessary measures to establish its competence to exercise jurisdiction over the offence of

[650] Supra note 634.
[651] This issue is different from the issue of universality of human rights. See SKOGLY, Beyond National Borders: States' Human Rights Obligations in International Cooperation. 2006. p.1.
[652] Bernard H Oxman, Jurisdiction of States, Max Planck Encyclopedia of Public International Law, November 2007.

enforced disappearance.' Article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that: 'Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4…' In most cases, however, human rights treaties use the term 'jurisdiction' to indicate whose rights a State shall ensure. Although 'jurisdiction' may not be the best choice to indicate the scope of the persons whose rights a State shall ensure, this book keeps using it in order to fit into current human rights law debates.

This book has demonstrated the relevance of jurisdiction for positive obligations. Thus, a unified approach is needed to address the scope of State obligations in regards to all human rights treaties regardless of whether the treaty contains a jurisdiction clause. This approach is also compatible with the idea that all human rights are indivisible, interdependent and interrelated.[653] Therefore, the following observations are applicable to all human rights treaties.[654]

If a person falls within the jurisdiction of a State when a human rights abuse against him or her happens, then this person has an entitlement to positive obligations (including obligations to provide a substantial remedy in civil litigation) from this State. Alternatively, if a perpetrator who abuses or may abuse human rights falls within the jurisdiction of a State, then the State should also punish this person or prevent this person from abusing human rights.[655] In the discourse of business and human rights, an MNC is headquartered in the territory of a home State and therefore within its jurisdiction. The home State should prevent that MNC from abusing human rights, including through the conduct of its subsidiaries abroad. Its legal basis is a State's due diligence obligation. In this situation, a victim or a potential victim may not be entitled to request protection from the home State.[656] The Maastricht Principles have clarified home State obligations in the latter

[653] Supra note 526.
[654] Positive obligations under Article 2(1) of the ICCPR are an exception because of the unique language. See the last chapter, at 4.3.2.
[655] Supra note 571.
[656] Previous Section 4.1.

sense.[657] However, the Maastricht Principles have not indicated whether a victim of a corporate human rights abuse located in a host State has an entitlement from a home State. In this sense, what the Maastricht Principles labeled as 'extraterritorial obligation to protect' is a State due diligence obligation, in essence.[658]

In the face of present-day conditions, could a person located in a host State fall within the jurisdiction of a home State? This chapter has argued that, the individuals located in a host State could be within the jurisdiction of a home State for the purpose of seeking regulation over MNC to the extent that the home State has limited the regulatory power of the host State through international investment law practice. Therefore, in the discourse of business and human rights, it is important to distinguish a host State's unwillingness to regulate an MNC from a host State's inability to regulate an MNC due to its investment treaty with a home State.[659] If a host State is unable to regulate an MNC in its territory due to an investment treaty with a home State, then the home State should even take over the primary obligation to regulate the MNC from the host State. In this situation, a home State should take preventive measures and provide both procedural and substantial remedies to victims and victims have an entitlement to request that the home State regulate business. If a host State is just unwilling to regulate an MNC, this host State remains primarily responsible for preventing human rights abuses in its territory. In the latter situation, a home State only has a supplementary obligation, namely the due diligence of preventing a perpetrator in its territory from abusing

[657] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, available at: http://www.etoconsortium.org/en/library/maastricht-principles/ (last accessed 23-07-2014), para.25.
[658] Olivier De Schutter, et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, 34 HUMAN RIGHTS QUARTERLY 1084(2012). p.136.
[659] Previous research has not made a distinction between unwillingness and inability of a host State to regulate business. Tebello Thabane, *Weak Extraterritorial Remedies: The Achilles Heel of Ruggie's 'Protect, Respect and Remedy' Framework and Guiding Principles* 14 AFRICAN HUMAN RIGHTS LAW JOURNAL 43(2014). p.47. Menno Kamminga, Corporate Obligations under International Law, in Report of the 71st Conference of the International Law Association. (pp.422-427). Berlin: International Law Association, 2004. p.425.

human rights abroad.[660] In this situation, whether individual victims are entitled to request protection from a home State depends on the extent that the home State has limited the regulatory power of the host State through international investment law practice. In any case, a home State's extraterritorial obligation to respect is always at issue if the conduct of its State-owned corporations can be attributed to it.

This book admits that it is difficult to draw a line between a host State's unwillingness to regulate an MNC and a host State's inability to regulate an MNC. In particular, it is difficult to measure to what extent a home State has limited the regulatory power of a host State through international investment law practice. More quantitative research is needed in the future to develop an economic model. The idea of a distinction between the unwillingness and the inability of a host State to regulate MNCs is that a home State may incur different extents of obligations arising from human rights treaties.

[660] In this sense, the host State and the home State have a shared responsibility. Supra note 177. Supra note 532.

Chapter 5 Home State Obligations in the Work of Human Rights Treaty Bodies

1. Introduction

The output of human rights treaty bodies, especially their general comments and concluding observations, are relevant for the interpretation of human rights treaties.[661] This chapter examines whether the notion of home State obligations has been clarified in State reporting procedures before human rights treaty bodies. Human rights treaty bodies have played an important role in explaining and clarifying individual rights and State obligations arising from respective human rights treaties. This chapter aims to find out how treaty bodies interpret home State obligations in State reporting procedures and then make comments on their interpretations based on the theory developed in former chapters. It also explores whether general comments and concluding observations of treaty bodies could become subsequent practice under the meaning of Article 31 of the VCLT by a desk study of the ICJ case law and the relevant reports of the International Law Association and the UN International Law Commission.

There are nine core international human rights treaties under the UN treaty system. Each treaty has established a treaty body, namely a committee of experts, to monitor the implementation of treaty provisions. Treaty bodies mainly work by way of reporting procedures, communication procedures and inquiry procedures (only for some committees). Furthermore, almost every treaty body has published its interpretation on respective human rights treaty in the form of 'general comments' or 'general recommendations'.[662] This chapter mainly focuses on the general

[661] The ICJ, Republic of Guinea v. Democratic Republic of the Congo, Judgment of 30 November 2010, para.66.
[662] United Nations, Human Rights Treaty System, Fact Sheet No. 30/Rev.1, New York and Geneva, 2012, p.36.

comments and concluding observations of five committees, namely the Human Rights Committee (the HRC), the Committee on Economic, Social and Cultural Rights (the CESCR), the Committee on the Elimination of Racial Discrimination (the CERD), the Committee on the Elimination of Discrimination against Women (the CEDAW), and the Committee on the Rights of the Child (the CRC).[663] The reason for choosing these five committees is as follows: firstly, the first two committees monitor two general human rights treaties, respectively the ICCPR and the ICESCR; secondly, the other three committees monitor the rights of specific groups who are vulnerable to corporate abuses. It does not mean that other treaty bodies have not dealt with the issue of home State obligations or the extraterritorial dimension of human rights.[664] For the CESCR, this chapter will also mention a specific statement it has published on business and human rights: the statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights.[665]

Treaty bodies publish all their works on the website of the UN Office of the High Commissioner for Human Rights (the OHCHR), which will be used as a database for exploring approaches to home State obligations adopted by different treaty bodies. [666] The keywords used to search the targeted documents include 'extraterritorial', 'in other/another countr(y/ies)', 'in other/another State', 'State-

[663] The communication and the inquiry procedures are also important, but in these procedures home State obligations have hardly been dealt with by treaty bodies. The author has surveyed the output of communication and inquiry procedures between 2010 and 2015 towards the top 20 investor-economies in 2012 (according to the world investment report 2013). Treaty bodies had no chance in these procedures to deal with home State obligations.

[664] For example, the Committee against Torture 'has commended the efforts of States parties for providing civil remedies for victims who were subjected to torture or ill-treatment outside their territory. This is particularly important when a victim is unable to exercise the rights guaranteed under article 14 in the territory where the violation took place.' Committee against Torture, General Comment No. 3, 13 December 2012, CAT/C/GC/3, para.22. The Committee against Torture has also monitored the principle of non-refoulement in most concluding observations.

[665] Committee on Economic, Social and Cultural Rights, Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural Rights, 12 July 2011. E/C.12/2011/1.

[666] The database is available at: http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx (last accessed 10-6-2014).

owned', 'third part(y/ies)', 'private actor', 'corporat(e/ion)', and 'compan(y/ies)'. In terms of reporting procedures, it is impossible and unnecessary to study the case of every State due to the large number of State parties. This chapter will only research the latest concluding observations towards the States among the top 20 home economies reported by world investment reports. According to the world investment report 2013 and 2014, the States among the top 20 home economies include: United States, Japan, China, United Kingdom, Germany, Canada, Russian Federation, Switzerland, France, Sweden, Republic of Korea, Italy, Mexico, Singapore, Chile, Norway, Ireland, Luxembourg, Netherlands, Spain, and Austria.[667] Belgium will be added because it used to be one of the five top home economies among developed countries.[668] The States selected are representative in the sense that they cover most powerful home States and even include two 'BRIC' countries that are considered as emerging economies.[669]

2. The Committee on Economic, Social and Cultural Rights

The supervisory body of the ICESCR is the Committee on Economic, Social and Cultural Rights (the CESCR). Unlike other human rights treaty bodies established directly on the basis of respective treaties, the CESCR was created by the resolution of the UN Economic and Social Council (the ECOSOC) to carry out the monitoring functions assigned to the ECOSOC in Part IV of the ICESCR.[670] Notwithstanding the lack of direct authorization from the ICESCR, the CESCR is generally

[667] United Nations Conference on Trade and Development, World Investment Report 2013: Global Value Chains: Investment and Trade for Development, Geneva, 2013, p.xv; United Nations Conference on Trade and Development, World Investment Report 2014: Investing in the SDGs: An Action Plan, Geneva, 2014, p.xv.
[668] United Nations Conference on Trade and Development, World Investment Report 2012: Towards a New Generation of Investment Policies, Geneva, 2012, p.60.
[669] Wikipedia, BRIC, available at: http://en.wikipedia.org/wiki/BRIC (last accessed 14-5-2014).
[670] Economic and Social Council resolution 1985/17.

considered as one of treaty bodies monitoring respective human rights treaties.[671] Consisting of 18 independent experts, the CESCR in practice enjoys independence from the ECOSOC to a large extent.[672] This chapter assigns more pages to the output of the CESCR, because it has tackled the extraterritorial aspects of the ICESCR in depth since 1990s.

2.1. General Comments

The Committee has published 23 general comments to interpret certain provisions of the ICESCR.[673] In the early 1990s, the Committee began to develop its views on the extraterritorial aspect of the ICESCR on a general level through its general comments.[674] As far as the obligations of home States are concerned, the Committee has elaborated on the obligation of States to prevent non-State actors from violating the economic, social and cultural rights of people living in another country in some general comments. The following part shows the general comments adopted since General Comment No 12 in 1999.[675]

2.1.1. General Comments Involving Home State Obligations

In General Comment No 12 (on the right to adequate food), the Committee for the first time illustrated the tripartite typology of State obligations, namely the obligations to respect, to protect and to fulfill.[676] Among them, the obligation to

[671] See the website of the Office of the United Nations High Commissioner for Human Rights (OHCHR), available at: <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>(last accessed 16-4-2014).
[672] WOUTER VANDENHOLE, THE PROCEDURES BEFORE THE UN HUMAN RIGHTS TREATY BODIES: DIVERGENCE OR CONVERGENCE? (Intersentia. 2004). p.49.
[673] All general comments are available on the website of the Office of the United Nations High Commissioner for Human Rights (OHCHR), available at: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11>(last accessed 1-6-2017).
[674] Coomans, HUMAN RIGHTS LAW REVIEW, (2011). p.8.
[675] Before that, there were only two general comments concerning specific economic, social and cultural rights, namely General Comment No 4 and No 7 on the right to adequate housing. In these general comments, the Committee did not mention the State obligation to protect people in another country.
[676] Committee on Economic, Social and Cultural Rights, General Comment No 12: The right to adequate food (art. 11), 12 May 1999, E/C.12/1999/5, para.15.

protect concerns the obligation of a State to regulate corporations.[677] The Committee explicitly mentioned the obligation to protect the right to food in other countries. In the section entitled 'international obligations', the Committee stated that: 'States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.'[678] Here, the Committee did not make it clear against whom a State should take measures. The Committee did not clarify who can invoke the obligation to protect either.

Similarly, in General Comment No 14 (on the right to health) the Committee pointed out that: 'States parties have to … prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.'[679] Here the third parties are those a State is able to influence with legal or political means. These words have imposed obligations or duties to regulate business on a wide range of States, not only the host and home States, but also other States that are able to influence the related companies.

In General Comment No 15 (on the right to water), the Committee stated that: 'Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.'[680] Similar to the last General Comment, this one requires States to take regulatory steps not

[677] Id, para.15.
[678] Id, para.36.
[679] Committee on Economic, Social and Cultural Rights, General Comment No 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 11 August 2000, E/C.12/2000/4, para.39.
[680] Committee on Economic, Social and Cultural Rights, General Comment No 15: The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), 20 January 2003, E/C.12/2002/11, para.33.

only against their own citizens or corporate nationals but also against those they can influence.

In addition, the Committee has expressed similar views in its General Comment No 19 (on the right to social security). It should be noted that, in this General Comment, the Committee for the first time employed such a term as extraterritorially.[681] It has stated that: 'States parties should protect the right to social security extraterritorially by preventing their own citizens and national entities from violating this right in other countries.'[682] Again, the Committee has avoided answering the question whether individuals located in a host State are within the jurisdiction of a home State. Instead, the Committee focused on whether a perpetrator is within the territory or jurisdiction of a home State.

In its General Comment No 23 (on the right to just and favorable conditions of work), the Committee cited the Maastricht Principles and stated that: 'States parties should take measures… to clarify that their nationals, as well as enterprises domiciled in their territory and/or jurisdiction, are required to respect the right...'[683] The Committee has further pointed out that State should ensure that victims have access to remedy.[684] The Committee has begun to impose home State obligations in relation to State-owned corporations. In this general comment, it has asserted that:

> States parties must refrain from acts or omissions that interfere, either directly or indirectly, with the realization of the right to just and favorable conditions of work in other countries. This is particularly relevant when a State party owns or controls an enterprise or provides substantial support and services to an enterprise operating in another State party. To this end, the State party should respect relevant host-country legislation that complies with the Covenant. When the home country has stronger legislation, the

[681] Committee on Economic, Social and Cultural Rights, General Comment No 19: The right to social security (art. 9), 4 February 2008, E/C.12/GC/19, para.54.
[682] Id.
[683] Committee on Economic, Social and Cultural Rights, General Comment No 23: on the right to just and favorable conditions of work, 27 April 2016, E/C.12/GC/23, para.70.
[684] Id.

State party should seek to maintain similar minimum standards in the host country as much as practicable.[685]

In its General Comment No 22 (on the right to sexual and reproductive health), the Committee even articulated a general extraterritorial obligation, the scope of which is wider than home State obligations. It has stated that: 'States also have an extraterritorial obligation to ensure that transnational corporations, such as pharmaceutical companies operating globally, do not violate the right to sexual and reproductive health of people in other countries...'[686] The Committee did not define who should be protected or who should be regulated in detail.

2.1.2. General Comments without Mentioning Home State Obligations

Unlike the above-mentioned General Comments, there are several General Comments in which the Committee did not deal with home State obligations. In General Comment No 13, No 16, No 20, and No 21, the Committee employed the tripartite typology of State obligations (the obligations to respect, to protect and to fulfill) as it did before, but it did not mention the extraterritorial aspects of the obligation to protect, nor did it express similar views explicitly.[687] In General Comment No 17 and No 18, the Committee only referred to the individuals within their jurisdiction as the persons to be protected. For instance, in General Comment No 17 the Committee stated that: 'Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard authors within their jurisdiction from infringements of their moral and material interests by

[685] Id, para.69.
[686] Committee on Economic, Social and Cultural Rights, General Comment No 22: on the right to sexual and reproductive health, 2 May 2016, E/C.12/GC/22, para.60.
[687] Committee on Economic, Social and Cultural Rights, General Comment No 13: The right to education (article 13 of the Covenant), 8 December 1999, E/C.12/1999/10; General Comment No 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3), 11 August 2005, E/C.12/2005/4; General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2, para.2), 2 July 2009, E/C.12/GC/20; General Comment No 21: Right of everyone to take part in cultural life (art. 15, para.1 (a)), 21 December 2009, E/C.12/GC/21.

third parties.'[688] However, the CESCR has not clarified whether the victims of a corporate abuse in a host State are within the jurisdiction of the home State of the MNC concerned.

The scope of State obligations with regard to specific rights in the general comments of the CESCR can be summarized in the following table.

Table 3: The Scope of Obligations with Regard to Specific Rights in the General Comments of the CESCR

The Specific Rights in the Covenant	**General Comment No. and the Year**	**Typology of State Obligations**	**Home State Obligations**
The right to adequate housing	No.4, 1992 No.7, 1997	Not mentioned	Not mentioned
The right to adequate food	No.12, 1999	Obligation to respect, to protect and to fulfill	Yes
The right to education	No.13, 1999	Obligation to respect, to protect and to fulfill	Not mentioned
The right to health	No.14, 2000	Obligation to respect, to protect and to fulfill	Yes
	No.22, 2016	Obligation to respect, to protect and to fulfill	Extraterritorial obligations in general: more than just home State
The right to water	No.15, 2002	Obligation to respect, to protect and to fulfill	Yes

[688] Committee on Economic, Social and Cultural Rights, General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15), 12 January 2006, E/C.12/GC/17, para.45.

The right to benefit from the protection of interests resulting from any scientific, literary or artistic production	No.17, 2005	Obligation to respect, to protect and to fulfill	Not mentioned
The right to work	No.18, 2005	Obligation to respect, to protect and to fulfill	Not mentioned
The right to social security	No.19, 2007	Obligation to respect, to protect and to fulfill	Yes
The right to take part in cultural life	No.21, 2009	Obligation to respect, to protect and to fulfill	Not mentioned
The right to the enjoyment of just and favorable conditions of work	No.23, 2016	Obligation to respect, to protect and to fulfill	Yes (including home State obligations over State-owned corporations)
The right to form and join trade unions	No general comment on this right		
The right relating to family life	No general comment on this right		

(Source: made by the author, based on the information before 1 June 2017)

2.2. Statements

The statements are not legally binding but they show the concerns and attitudes of the Committee on certain aspects of the Covenant rights. In 2011, the Committee made a statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights.[689] This statement deals exclusively with the topic of business and human rights and it explicitly elaborates on the concept of home State obligations to regulate corporations.

[689] Committee on Economic, Social and Cultural Rights, Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural Rights, 12 July 2011. E/C.12/2011/1.

In this statement, the Committee first expressed its concerns that 'corporate activities can adversely affect the enjoyment of Covenant rights'.[690] Then the Committee clearly illustrated that: 'States parties have the primary obligation to respect, protect and fulfill the Covenant rights of all persons under their jurisdiction in the context of corporate activities undertaken by State-owned or private enterprises.'[691] The Committee did not stop here and it further elaborated on the concept of home State obligations. The Committee stated that: 'States parties should also take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction.'[692] The statement also calls on States parties to include information in their initial and periodic reports on challenges faced and measures taken in relation to the role and impact of the corporate sector on the realization of economic, social and cultural rights.[693] The Committee has mentioned both jurisdiction over victims (rights of all persons under their jurisdiction) and jurisdiction over abusers (corporations under their jurisdiction), but it has not explained whether they are the same.

This statement indicates that 'business and human rights' has become one of the concerns of the Committee. It is clear that the Committee has taken an affirmative stance towards home State obligations. It should be noted that this statement has been mentioned several times in the concluding observations of the Committee.[694] However, the committee has not provided a clear benchmark for home State obligations, and it sometimes refers to jurisdiction over victims and sometimes refers to jurisdiction over abusers.

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[690] Id, para.1.
[691] Id, para.3.
[692] Id, para.5.
[693] Id, para.7.
[694] Committee on Economic, Social and Cultural Rights, Concluding observations concerning the fourth periodic
report of Belgium, 23 December 2013, E/C.12/BEL/CO/4; Concluding observations on the fourth periodic report of Austria, 29 November 2013, E/C.12/AUT/CO/4; Concluding observations on the fifth periodic report of Norway, 29 November 2013, E/C.12/NOR/CO/5.

2.3. Concluding Observations

The 2008 reporting guidelines do no request States to submit information on 'business and human rights'.[695] Research shows that the issue of home State obligations had not been raised by the Committee in its concluding observations before 2011.[696] However, things have changed since the Committee in 2011 published the above-mentioned statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights. In this statement, the Committee calls on State parties to include information in their reports on 'business and human rights' and encourages stakeholders to provide information on this issue.[697]

2.3.1. Concluding Observation concerning Germany

In 2011, the Committee began to express its concerns and suggestions on home State obligations in its concluding observations. In the Concluding Observations regarding Germany in 2011, the Committee pointed out that:

> The Committee expresses concern that the State party's policy-making process in, as well as its support for, investments by German companies abroad does not give due consideration to human rights. The Committee calls on the State party to ensure that its policies on investments by German companies abroad serve the economic, social and cultural rights in the host countries.[698]

[695] Committee on Economic, Social and Cultural Rights, Guidelines on treaty-specific documents to be submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, 2008. E/C.12/2008/2.
[696] Coomans, HUMAN RIGHTS LAW REVIEW, (2011). p.29.
[697] Committee on Economic, Social and Cultural Rights, Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural Rights, 12 July 2011. E/C.12/2011/1, para.7.
[698] The Committee on Economic, Social and Cultural Rights, Concluding Observations, Germany, 12 July 2011, E/C.12/DEU/CO/5, para.10.

The language of this suggestion is very weak and the Committee has not clarified the legal basis of this opinion. The term 'German companies' seems to indicate that the threshold for home State obligations is jurisdiction over abusers.

2.3.2. Concluding Observation concerning Belgium

In its Concluding Observations concerning Belgium in 2013, the Committee stated that: 'The Committee recommends that the State party systematically conduct human rights impact assessments in order to ensure that projects promoting agro fuels do not have a negative impact on the economic, social and cultural rights of local communities in third countries where Belgian firms working in this field operate.'[699] These remarks indicate that a home State should take due diligence measures (for example conducting human rights impact assessments) when it spurs overseas investments through its State policy. However, it remains unclear whether these due diligence obligations could give rise to individual entitlement.

2.3.3. Concluding Observation concerning Norway

In its Concluding Observations concerning Norway in 2013, the Committee stated that: 'The Committee also recommends that the State Party adopt policies and other measures to prevent human rights contraventions abroad by corporations which have their main offices under the jurisdiction of the State Party.'[700] In this Concluding Observation, the Committee has generally adopted a due diligence obligation approach to home State obligations by emphasizing jurisdiction over abusers.[701] This is an obligation to take measures to improve domestic legal regime to adjust human rights contraventions abroad by corporations which have their main offices under the jurisdiction of the home State.

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[699] Committee on Economic, Social and Cultural Rights, Concluding observations concerning the fourth periodic report of Belgium, 23 December 2013, E/C.12/BEL/CO/4, para.22.
[700] Committee on Economic, Social and Cultural Rights, Concluding observations on the fifth periodic report of Norway, 29 November 2013, E/C.12/NOR/CO/5, para.6.
[701] The last chapter, at 5.4.

2.3.4. Concluding Observation concerning China

In 2014, the Committee for the first time dealt with the obligations of China as a home state in its concluding observations on the second periodic report of China. The Committee mentioned this issue under the title of 'Business and Economic, Social and Cultural Rights'. The Committee first expressed its concern about 'the lack of adequate and effective measures adopted by the State party to ensure that Chinese companies both State-owned and private, respect economic, social and cultural rights, including when operating abroad'.[702] The Committee recommended that the State party 'adopt appropriate legislative and administrative measures to ensure legal liability of companies and their subsidiaries operating in or managed from the State party's territory regarding violations of economic, social and cultural rights in their projects abroad'.[703] The Committee has mentioned Chinese State-owned corporations, but it has not distinguished different obligations over State-owned corporations and over ordinary corporations. This book has argued that the obligation of a home State over State-owned corporations is different from its obligation over ordinary companies.[704] A State-owned corporation entails the home State's own obligation to respect human rights. The extraterritorial obligation to respect human rights will immediately impose the burden of investigation on the home State which denies a certain abuse of human rights based on preliminary evidence.

2.3.5. Other Countries

Furthermore, the Committee also mentioned home State obligations in its Concluding Observation concerning Austria.[705] By contrast, the Committee did not

[702] Committee on Economic, Social and Cultural Rights, Concluding observations on the second periodic report of China, including Hong Kong, China and Macao, China, 13 June 2014, E/C.12/CHN/CO/2, para.13.
[703] Id.
[704] The last chapter, at 6.
[705] Committee on Economic, Social and Cultural Rights, Concluding observations on the fourth periodic report of Austria, 13 December 2013, E/C.12/AUT/CO/4, para.12.

mention the issue of home State obligations in its Concluding Observations concerning other countries.

2.4. Assessment

The CESCR has gradually developed and elaborated on the idea of home State obligations. Such an obligation was first mentioned in a 'General Comment' of the Committee. In 2011, the Committee made it clear by its 'Statement' that States should take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction. The statement calls on States parties to provide information on their regulations over business. Since 2011 the Committee has dealt with home State obligations in several Concluding Observations. On 21 February 2017, the CESCR held a full day of General Discussions on the draft General Comment on State obligations under the ICESCR in the context of business activities.[706] A new general comment on business and human rights is forthcoming.

Overall, the Committee takes a positive stance towards the issue of home State obligations. The Committee's interpretation is becoming more and more concrete: from generally mentioning the extraterritorial aspect of the ICESCR to specifically indicating a home State's territorial obligations with extraterritorial effects. The language used by the CESCR to indicate which companies should be regulated is inconsistent: sometimes reference is made to 'enterprises domiciled in their territory and/or jurisdiction', sometimes 'Chinese companies' or other times to 'Belgian firms'. The Committee has also mentioned home State obligations in relation to State-owned corporations.[707] However, it has not developed different types of obligations over different kinds of corporations based on the secondary

[706] Committee on Economic, Social and Cultural Rights, Committee on Economic, Social and Cultural Rights holds General Discussion on State obligations in the context of business activities, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21210&LangID=E (last accessed 1-3-2017).
[707] Supra note 685, Supra note 702.

rules on attribution.[708] As to the specific measures to be taken, the Committee does not provide a unified standard but leaves considerable space for the State's discretion. The Committee has developed a general obligation on a home State to establish a regulatory framework to hold companies seated in its territory accountable for human rights abuse abroad.

It should be noted, however, that the practice of the Committee is by no means coherent enough. First, the Committee did not mention home State obligations in all General Comments concerning specific rights but only in some of them. Second, even after 2011, the Committee did not deal with this issue with regard to every State (even for those important home States) report. Third, when the Committee referred to the obligation to protect, sometimes it stressed that individuals within the jurisdiction of a State were the persons to be protected (General Comment No 17 and No 18); but in most cases, it avoided answering the question of whether individuals located in a host State were within the jurisdiction of a home State.

3. The Human Rights Committee

3.1. General Comments

The Human Rights Committee (the HRC) has mentioned the obligation to prevent private violations in several General Comments. In General Comment No 34, the HRC stated that: 'The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression…'[709] In General Comment No 35, the HRC pointed out that: 'States parties have the duty to take appropriate measures to protect the right to liberty of person against deprivation by third

[708] Id.
[709] Human Rights Committee, General Comment No. 34 (Article 19: Freedoms of Opinion and Expression), 12 September 2011, CCPR/C/GC/34, para.7.

parties.'[710] In these General Comments, the HRC did not indicate whether the obligation to protect has extraterritorial dimensions.

The HRC has indeed supported the extraterritorial application of the ICCPR in general in its General Comment No 31.[711] This General Comment concerns the State's general obligations. The HRC stated in this General Comment that: 'States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.'[712] In this General Comment the HRC has adopted a disjunctive interpretation of 'within its territory and subject to its jurisdiction' under Article 2(1) of the ICCPR. Chapter 3 has argued that this interpretation is problematic.[713] The HRC has further interpreted jurisdiction as the power or effective control of a State over a person without mentioning the interpretative method. However, the HRC has not provided a benchmark to assess when a person is within the power of a State. It is unclear whether individual victims in a host State are within the power of the home State.

3.2. Concluding Observations

The HRC has adopted a different approach from the above General Comment in its Concluding Observations. So far the HRC has already mentioned home State obligations in Concluding Observations concerning Germany, the Republic of

[710] Human Rights Committee, General Comment No. 35 (Article 9: Liberty and Security of Person), 16 December 2014, CCPR/C/GC/35, para.7.
[711] Human Rights Committee, General Comment No. 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant), 26 May 2004, CCPR/C/21/Rev.1/Add.13.
[712] Id, para.10.
[713] Chapter 3, at 4.1.

Korea, Canada, and Italy.[714] In its concluding observation concerning Germany (in 2012), the HRC stated that:

> While welcoming measures taken by the State party to provide remedies against German companies acting abroad allegedly in contravention of relevant human rights standards, the Committee is concerned that such remedies may not be sufficient in all cases. The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.[715]

In its concluding observation concerning the Republic of Korea (in 2015), the HRC expressed similar recommendations under the title of business and human rights.[716] In these two concluding observations, the HRC has encouraged a home State to provide remedies for victims of corporate abuses regardless of whether the victims were within its jurisdiction.

Moreover, the HRC has been 'concerned about allegations of human rights abuses by Canadian companies operating abroad' in its concluding observations concerning Canada (in 2015).[717] The HRC has further recommended that:

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[714] Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Germany, 12 November 2012, CCPR/C/DEU/CO/6, para.16; Concluding Observations on the Fourth Periodic Report of the Republic of Korea, 3 December 2015, CCPR/C/KOR/CO/4, para.11; Concluding Observations on the Sixth Periodic Report of Canada, 13 August 2015, CCPR/C/CAN/CO/6, para.6; Concluding Observations on the Sixth Periodic Report of Italy, 1 May 2017, CCPR/C/ITA/CO/6, para.37.

[715] Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Germany, 12 November 2012, CCPR/C/DEU/CO/6, para.16.

[716] Human Rights Committee, Concluding Observations on the Fourth Periodic Report of the Republic of Korea, 3 December 2015, CCPR/C/KOR/CO/4, para.11.

[717] Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Canada, 13 August 2015, CCPR/C/CAN/CO/6, para.6.

> The State party should (a) enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations under its jurisdiction, in particular mining corporations, respect human rights standards when operating abroad; (b) consider establishing an independent mechanism with powers to investigate human rights abuses by such corporations abroad; and (c) develop a legal framework that affords legal remedies to people who have been victims of activities of such corporations operating abroad.[718]

In its concluding observations, the HRC has adopted a due diligence obligation approach by focusing on the companies to be regulated rather than the persons to be protected. Therefore, a home State is obliged to enhance remedies for victims of activities of the enterprises domiciled in its territory and/or its jurisdiction, regardless of whether the victims are within its jurisdiction.

3.3. Assessment

The HRC has adopted two different approaches to the scope of State obligations respectively in its General Comment No 31 and Concluding Observations. In its General Comment No 31, it considers State obligations from the perspective of the persons to be protected. According to this approach, only when a person is within the jurisdiction of a State, then the State should protect his rights from being violated by a company. This approach is not favorable to home State obligations in general, because it is hard to prove that the (potential) victims of a corporate human rights abuse are within the power or effective control (the HRC's definition of jurisdiction) of a home State. In its concluding observations, the HRC considers State obligations from the perspective of the companies to be regulated. According to this approach, as long as a company is domiciled in the territory and/or jurisdiction of a home State, the home State should prevent it (including through its subsidiaries abroad) from violating human rights abroad and punish it when it has violated human rights abroad.

[718] Id.

4. The Committee on the Elimination of Racial Discrimination

4.1. General Comments

Article 6 of the ICERD contains a jurisdiction clause (assure to everyone within their jurisdiction effective protection and remedies).[719] The CERD has not dealt with home State obligations in its General Comments, but it has clarified the concept in several Concluding Observations.

4.2. Concluding Observations

4.2.1. Concluding Observation concerning Canada

In 2012, the CERD stated that: 'The Committee recommends that the State party take appropriate legislative measures to prevent transnational corporations registered in Canada from carrying out activities that negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada, and hold them accountable.'[720] The CERD did not interpret whether potential victims are within the jurisdiction of Canada. Instead, it has stressed that Canada should regulate corporations registered in Canada.

4.2.2. Concluding Observation concerning United States

In 2014, the CERD stated that: 'The Committee calls upon the State party to: … Take appropriate measures to prevent the activities of transnational corporations registered in the State party which could have adverse effects on the enjoyment of human rights by local populations, especially indigenous peoples and minorities, in

[719] International Convention on the Elimination of All Forms of Racial Discrimination, Article 6.
[720] Committee on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada, 4 April 2012, CERD/C/CAN/CO/19-20, para.14.

other countries.'[721] These remarks further indicate that the due diligence obligation approach could work along with treaty provisions containing the jurisdiction clause.[722]

4.2.3. Concluding Observation concerning United Kingdom

In 2011, the CERD stated that: 'The Committee encourages the State party to take appropriate legislative and administrative measures to ensure that acts of transnational corporations registered in the State party comply with the provisions of the Convention.'[723] The CERD has further elucidated due diligence obligation approach and it has kept silent on whether potential victims are within the jurisdiction of a home State. The CERD has recommended specific measures for regulating companies registered in a home State, including eliminating legal obstacles for victims to get remedy in domestic courts.

4.2.4. Other Countries

The CERD has also elaborated on home State obligations in its Concluding Observations concerning Norway and Australia.[724] It has not supervised such an issue in Concluding Observations concerning other countries.

[721] Committee on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America, 25 September 2014, CERD/C/USA/CO/7-9, para.10.
[722] The last chapter, at 4.1.
[723] Committee on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United Kingdom, 14 September 2011, CERD/C/GBR/CO/18-20, para.29.
[724] Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Norway, 8 April 2011, CERD/C/NOR/CO/19-20, para.17. Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Australia, 13 September 2010, CERD/C/AUS/CO/15-17, para.13.

5. The Committee on the Elimination of Discrimination against Women

The CEDAW has dealt with home State obligations in both General Comments and Concluding Observations. Like the ICESCR, the ICEDAW does not contain a jurisdiction clause.[725] This section shows that the CEDAW has generally adopted a due diligence obligation approach to home State obligations.

5.1. General Comments

The CEDAW pointed out in its General Comment No 28 (on the core obligations of States parties) that:

> The obligations incumbent upon States parties that require them to establish legal protection of the rights of women on an equal basis with men, ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination and take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise also extend to acts of national corporations operating extraterritorially.[726]

The last sentence specifically refers to home State obligations. The CEDAW has developed home State obligations over corporate nationals and it has respected State's own definition of corporate national.

The CEDAW stated in its General Comment No 30 that: 'The Committee reaffirmed in its general recommendation No. 28 the requirement in article 2 (e) of the Convention to eliminate discrimination by any public or private actor, which

[725] Convention on the Elimination of All Forms of Discrimination against Women.
[726] Committee on the Elimination of Discrimination against Women, General Recommendation No. 28, 16 December 2010, CEDAW/C/GC/28, para.36.

extends to acts of national corporations operating extraterritorially.' [727] The CEDAW has reiterated its General Comment No 28. This is a due diligence obligation approach in principle. The CEDAW has not put forward the definition of national corporations to replace a State's own definition.

The CEDAW further pointed out in General Comment No 34 that:

> States parties should regulate the activities of domestic non-State actors within their jurisdiction, including when they operate extraterritorially... States parties should uphold extraterritorial obligations with respect to rural women by, inter alia: not interfering, directly or indirectly, with the enjoyment of their rights; taking regulatory measures to prevent any actor under their jurisdiction, including private individuals, companies and public entities, from infringing or abusing the rights of rural women outside their territory… [728]

This General Comment also adopts the due diligence obligation approach, but it uses the term 'non-State actors within their jurisdiction' instead of 'national corporations'. Although the CEDAW has mentioned extraterritorial obligations, it in fact requires a home State to take regulatory measures within its territory for extraterritorial infringement of human rights by its corporate nationals.

5.2. Concluding Observations

The CEDAW has already tackled home State obligations in its Concluding Observation concerning Sweden, Switzerland, Canada, and Germany until 1 April 2017.[729] For instance, it stated in the Concluding Observation concerning Sweden

[727] Committee on the Elimination of Discrimination against Women, General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, 1 November 2013, CEDAW/C/GC/30, para.10.
[728] Committee on the Elimination of Discrimination against Women, General Recommendation No. 34 (2016) on the Rights of Rural Women, 7 March 2016, CEDAW/C/GC/34, para.13.
[729] Committee on the Elimination of Discrimination against Women, Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Sweden, 10 March

that: 'It further recommends that the State party uphold its due diligence obligations to ensure that companies under its jurisdiction or control respect, protect and fulfil women's human rights when operating abroad.'[730] The CEDAW's approach to home State obligations is similar to other treaty bodies. It has required States to regulate corporations within their territory and/or jurisdiction for extraterritorial effects on human rights.

6. The Committee on the Rights of the Child

The Committee on the Rights of the Child (the CRC) has been active in promoting home State obligations. The Convention on the Rights of the Child contains a jurisdiction clause in Article 2(1).[731] This section shows that the CRC has adopted the same approach with the CERD.

6.1. General Comments

The CRC has published a special General Comment on the impact of the business sector on children's rights.[732] The CRC has clarified that:

> Home States also have obligations to respect, protect and fulfil children's rights in the context of businesses' extraterritorial activities and operations,

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2016, CEDAW/C/SWE/CO/8-9, para.35; Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Switzerland, 25 November 2016, CEDAW/C/CHE/CO/4-5, para.41; Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Canada, 25 November 2016, CEDAW/C/CAN/CO/8-9, para.18; Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Germany, 9 March 2017, CEDAW/C/DEU/CO/7-8, para.15.

[730] Committee on the Elimination of Discrimination against Women, Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Sweden, 10 March 2016, CEDAW/C/SWE/CO/8-9, para.35.

[731] Article 2(1) provides that: 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.'

[732] Committee on the Rights of the Child, General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, 17 April 2013, CRC/C/GC/16.

> provided that there is a reasonable link between the State and the conduct concerned. A reasonable link exists when a business enterprise has its center of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned.[733]

According to this General Comment, a reasonable link between the State and the conduct concerned is a decisive criterion for home State obligations. Although there is a jurisdiction clause in Article 2(1) of the Convention on the Rights of the Child, the CRC did not discuss whether an individual who is potentially affected by an MNC is within the jurisdiction of a home State in the above General Comment. The CRC has adopted the same approach with the CERD by focusing on the jurisdiction over the abusers (companies).

6.2. Concluding Observations

The CRC has dealt with home State obligations in its Concluding Observations concerning Australia, Canada, Germany, Italy, Korea, Singapore, France, and Switzerland until May 2016.[734] For example, in its Concluding Observation concerning Korea, the CRC recommended that the State party should 'further promote the adoption of effective corporate responsibility models by providing a legislative framework that requires companies domiciled in Korea to adopt

[733] Id, para.43.

[734] Committee on the Rights of the Child, Concluding Observations: Australia, 28 August 2012, CRC/C/AUS/CO/4, para.27; Concluding Observations: Canada, 6 December 2012, CRC/C/CAN/CO/3-4, para.29; Concluding Observations: Germany, 25 February 2014, CRC/C/DEU/CO/3-4, para.23; Concluding Observations: Italy, 31 October 2011, CRC/C/ITA/CO/3-4, para.21; Concluding Observations: Republic of Korea, 2 February 2012, CRC/C/KOR/CO/3-4, para.26; Concluding Observations: Singapore, 4 May 2011, CRC/C/SGP/CO/2-3, para.26; Concluding Observations: France, 23 February 2016, CRC/C/FRA/CO/5, para.22; Concluding Observations: Switzerland, 26 February 2015, CRC/C/CHE/CO/2-4, para.23.

measures to prevent and mitigate adverse human rights impacts in their operations in the country and abroad.'[735]

In its Concluding Observation concerning Switzerland, the CRC has suggested that the State party should 'ensure that business enterprises and their subsidiaries operating in or managed from the State party's territory are legally accountable for any violations of children's rights and human rights in general.'[736] These Concluding Observations are basically the same with other treaty bodies' remarks.

The above observation of human rights treaty bodies' practice indicates that all of them have adopted a due diligence obligation approach to home State obligations by focusing on jurisdiction over abusers (companies). Treaty bodies, even those monitoring the treaty with a jurisdiction clause, have not elaborated on whether individuals in a host State are within the jurisdiction of a home State. According to the above treaty bodies, the general obligation of a home State is to establish a healthy domestic legal order to address the problem of business and human rights. Treaty bodies have not reached a unified content of home State obligations. But some basic elements or principles can be induced from the treaty body practice: a home State should require companies to release information on extraterritorial human rights impacts; A home State should establish a legal regime enabling victim's access to justice.

7. The Interpretive Meaning of the Output of Treaty Bodies

A question arises as to whether the practice of human rights treaty bodies is qualified as 'subsequent practice' under the meaning of Article 31(3)(b) of the VCLT.

[735] Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention: Republic of Korea, 2 February 2012, CRC/C/KOR/CO/3-4, para.27.
[736] Committee on the Rights of the Child, Concluding observations on the combined second to fourth periodic reports of Switzerland, 26 February 2015, CRC/C/CHE/CO/2-4, para.23.

It is worth mentioning, first of all, that the UN human rights treaty bodies have played an important role in establishing the normative content of human rights and in giving concrete meaning to individual rights and State obligations.[737] In international law practice, the authoritative output of treaty bodies has been referred to by the International Court of Justice (the ICJ) to interpret human rights treaties. For example, in the *Diallo* case the ICJ stated that: 'The interpretation above is fully corroborated by the jurisprudence of the Human Rights Committee established by the Covenant to ensure compliance with that instrument by the States parties… Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its 'General Comments'.'[738] Therefore, the output of human rights treaty bodies has been employed by international tribunals such as the ICJ to interpret relevant human rights treaties.

It remains unclear, however, whether and under what conditions the interpretation of human rights treaties by treaty bodies constitutes 'subsequent practice' under the meaning of Article 31(3)(b) of the VCLT. The ICJ did not answer that question in the *Diallo* case, although it made reference to the output of treaty bodies to interpret human rights treaties. In that case, the practice of treaty bodies was mentioned not necessarily because it was the subsequent practice that should be taken into account when interpreting a treaty. At least, the ICJ did not explicitly articulate whether or not the practice of human rights treaty bodies is qualified as subsequent practice under Article 31(3)(b) of the VCLT.[739]

The terms 'subsequent practice' under Article 31(3)(b) of the VCLT is not anteceded by the word 'State', nor is it followed by the phrase 'of States' or

[737] Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 905(2009);Matthew Craven, *The UN Committee on Economic, Social and Cultural Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS : A TEXTBOOK (Asbjørn Eide, et al. eds., 2001). p.472.
[738] The ICJ, Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment of 30 November 2010, para.66.
[739] Id.

'between the parties' (the case of Article 31(3)(a)). It seems that subsequent practice is not limited to that conducted only by States, but it also includes the practice by other actors as long as they 'establish the agreement of the parties regarding its interpretation'. [740] This approach has been confirmed by the International Law Commission, the International Law Association and the ICJ in several cases.

The International Law Commission (the ILC) has been discussing the topic of 'subsequent agreements and subsequent practice in relation to interpretation of treaties' since 2010.[741] The ILC has published three reports regarding subsequent practice in relation to the interpretation of treaties. The first two reports deal with the definition and identification of subsequent practice. The first report adopted a narrow understanding of subsequent practice, whereas the second report adopted a broad one. The ILC stated in the first report that: 'Article 31 (3) (b) of the Vienna Convention does not explicitly require that it must be the practice of the parties to the treaty themselves, but the provision seems to imply this requirement. It is certainly the parties themselves, acting through their organs, who are competent to engage in interpretative treaty practice and to apply or to comment upon a treaty.'[742] The ILC also discussed the question of 'practice of other actors as evidence of State practice' in its first report.[743] The ILC pointed out that: 'Subsequent practice can consist of conduct of all State organs which can be attributed to a State for the purpose of treaty interpretation. Subsequent practice by non-State actors, including social practice, may be taken into account for the purpose of treaty interpretation as far as it is reflected in or adopted by subsequent State practice, or as evidence of

[740] Laurence Boisson de Chazournes, *Subsequent Practice, Practices, and "Family-Resemblance": towards Embedding Subsequent Practice in its Operative Milieu*, *in* TREATIES AND SUBSEQUENT PRACTICE (Georg Nolte ed. 2013). p.67.
[741] The UN General Assembly, Report of the International Law Commission, Sixty-second Session, 2010, Supplement No. 10 (A/65/10), para.21.
[742] The International Law Commission, First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation, Sixty-fifth Session, 2013, A/CN.4/660, para.117.
[743] Id, para.135.

such State practice.'[744] According to the first report of the ILC, the practice of treaty bodies could constitute evidence of State practice.

The ILC has adopted a broader understanding of subsequent practice in its second report. In this report, the ILC reduced the formal requirement of subsequent practice. The ILC stated that: 'The Commission has recognized that subsequent practice under article 31 (3) (b) consists of any 'conduct' in the application of a treaty which may contribute to establishing an agreement regarding the interpretation of the treaty. Depending on the treaty concerned, this includes not only externally oriented conduct, such as official acts, statements and voting at the international level, but also internal legislative, executive and judicial acts, as well as practices by non-State entities which fall within the scope of what the treaty conceives as forms of its application. The individual conduct which may contribute to a subsequent practice under article 31(3)(b) must not meet any particular formal criteria.'[745] According to the second report of the ILC, the output of human rights treaty bodies could constitute subsequent practice as long as it establishes an agreement between the parties regarding the interpretation of a treaty.

It is argued by a report of the International Law Association (the ILA) that treaty body findings may constitute or may generate 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. [746] According to this approach, the findings of treaty bodies themselves would not amount to subsequent practice (for the purposes of Article 31), but the responses of individual States or of the States parties as a whole to the findings of treaty bodies would constitute subsequent practice.[747] The ILA report holds that, in any given case, a positive or supportive response by a State or group

[744] Id, para.144.
[745] The International Law Commission, Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Sixty-sixth Session, 2014, A/CN.4/671, para.42.
[746] The International Law Association, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies, 2004, para.20.
[747] Id, para.21.

of States or even the acquiescence of States in a finding by a treaty body might constitute 'subsequent practice' under Article 31(3)(b) of the VCLT.[748]

In the *Whaling in the Antarctic* case, the ICJ has supported the ILA approach to a great extent. In this case, Australia filed an application against Japan alleging Japan's breach of the International Convention for the Regulation of Whaling (the ICRW). New Zealand intervened as a non-party in this case. According to Article III of the ICRW, the International Whaling Commission (the IWC) was established and tasked with the conservation of whales and the management of whaling. The IWC is composed of one member from each contracting government. According to Article VI of the ICRW, the IWC 'may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention'. One of the issues in this case was whether the IWC resolutions and guidelines constitute subsequent practice within the meaning of Article 31(3)(b) of the VCLT.[749]

In the above case, Australia claimed that IWC resolutions comprise a 'subsequent agreement between the parties regarding the interpretation of the treaty' and 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation', within the meaning of subparagraphs (a) and (b), respectively, of paragraph 3 of Article 31 of the Vienna Convention on the Law of Treaties.[750] New Zealand held the same opinion with Australia.[751] Japan has noted that the resolutions cited by Australia were adopted pursuant to the Commission's power to make recommendations. Japan has accepted that it has a duty to give due consideration to these recommendations, but it has emphasized that they are not binding.[752] The ICJ stated that: 'Many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without

[748] Id.
[749] The ICJ, Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), Judgment of 31 March 2014, paras.78-83.
[750] Id, para.79.
[751] Id, para.81.
[752] Id, para.80.

the concurrence of Japan. Thus, such instruments cannot be regarded as … subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty ...'[753] It can be inferred from the ICJ jurisprudence in the whaling case that subsequent practice under Article 31(3)(b) of the VCLT is not necessarily limited to direct State practice. Treaty body resolutions could comprise subsequent practice at least when they are supported by all State parties.[754]

Human rights treaty bodies are different from treaty bodies such as the IWC. The former are normally treaty bodies composed of independent experts, whereas the latter are treaty bodies composed of governments. Human rights treaty bodies are much closer to a judicial body and treaty bodies like the IWC are political bodies to a great extent. It is not uncommon that political bodies make a resolution on consensus or by a unanimous vote. However, it is nearly impossible to expect all State parties to endorse the output of human rights treaty bodies explicitly. A question then arises: can the output of human rights treaty bodies, if not endorsed by all State parties, be regarded as subsequent practice? Moreover, since States usually remain silent on and do not explicitly express their stance on the output of human rights treaty bodies, a further question arises as to whether the practice of treaty bodies, with regard to subsequent practice under the meaning of Article 31(3)(b) of the VCLT, need to be consented to explicitly or affirmed by State parties.

To answer the above two questions, three advisory opinions (*Certain Expenses*, *Namibia* and *Wall*) of the ICJ deserve mention. In the *Certain Expenses (1962)*, the ICJ was asked to give its opinion on whether certain expenditures which were authorized by the General Assembly constitute 'expenses of the organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations.[755] As far as this chapter is concerned, what is noteworthy is the court's

[753] Id, para.83.
[754] Id, para.46.
[755] Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: ICJ Reports 1962, p.156.

method of interpretation. Among others, the court relied on the practice of the General Assembly, reflecting on its resolutions, to interpret the UN Charter. The court noted that: 'It is a consistent practice of the General Assembly to include in the annual budget resolutions, provision for expenses relating to the maintenance of international peace and security.'[756] After analyzing several resolutions adopted by the General Assembly, the court concluded that there is no justification for reading into the text of Article 17, paragraph I, any limiting or qualifying word before the word 'budget'.[757] It is worth mentioning that some resolutions relied on by the ICJ were not unanimous and even were subject to substantial negative votes by some representative States.[758]

In the *Namibia (1971)*, the ICJ referred to the consistent practice of the Security Council and held that abstentions of permanent members should be considered as concurring votes under Article 27(3) of the UN Charter. The significant passage in terms of the method for interpretation reads as follows: 'The proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions… This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been *generally accepted* by Members of the United Nations and evidences a general practice of that Organization.'[759] (Emphasis added). In terms of the method of treaty interpretation, the ICJ simply assumed that the practice of the Security Council had been generally accepted by States, however, without substantiating it. That passage indicates that organ practice, if accepted by State parties as a whole,

[756] Id, p.160.
[757] Id, p.161.
[758] Id, p.174. See also Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 THE YALE JOURNAL OF INTERNATIONAL LAW 289(2013). p.320.
[759] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, ICJ Reports 1971, p.16, para.22.

can comprise subsequent practice under the meaning of Article 31(3)(b) of the VCLT. It is even argued by one author that in *Namibia (1971)* the ICJ established a rebuttable presumption that the organs can establish an interpretation of the Charter through their practice with the burden on the member States to protest or reject the interpretive relevance of any organ practice that might establish an interpretation with which they disagree.[760] If we apply the *Namibia* approach to human rights treaty body practice, it can be inferred that State parties have a duty to object to the interpretation by a treaty body if they disagree with it. If most States remain silent on a certain interpretation, that interpretation will be possibly qualified as subsequent practice under Article 31(3)(b) of the VCLT.

In the *Wall (2004)*, the ICJ interpreted Article 12 of the UN Charter in light of the practice of the General Assembly and even the Legal Counsel of the United Nations, assuming they were generally accepted by States.[761] Three crucial points deserve mention. First, the resolutions of the General Assembly that were relied upon by the ICJ were adopted in the face of substantial negative votes.[762] Second, many States remained silent on the practice of the Legal Counsel of the United Nations. Third, the Legal Counsel is only an internal organ of the UN and therefore it does not speak on behalf of any State. Human rights treaty bodies are similar to the UN Legal Counsel in that they both act independently. However, human rights treaty bodies are more authoritative than the UN Legal Counsel in the sense that the former is established in accordance with human rights treaties,[763] whereas the latter is only an internal organ without a treaty basis.

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[760] Supra note 758, p.323.
[761] The ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, paras.27-28.
[762] Supra note 758, p.325.
[763] Only the Committee on Economic, Social and Cultural Rights was indirectly established in accordance with the human rights treaty. It was created by the resolution of the UN Economic and Social Council ('ECOSOC') to carry out the monitoring functions assigned to the ECOSOC in Part IV of the ICESCR. Other committees were directly established according to human rights treaties.

The above three advisory opinions reveal the following jurisprudence. First, subsequent practice is not necessarily limited to the practice directly affected by States. Treaty body practice could also constitute subsequent practice under Article 31(3)(b) of the VCLT insofar as it establishes the agreement of State parties. Second, it is sufficient, for the purpose of establishing the agreement of State parties, that treaty body practice is accepted by State parties as a whole and not necessarily by all State parties. Third, States have a duty to protest or reject the interpretive relevance of any organ practice that might establish an interpretation with which they disagree. The silence of a State relation to a treaty body practice could be viewed as consent by acquiescing to the interpretation of treaty body.

8. Conclusion

Human rights treaty bodies have played an important role in promoting home State obligations. Notwithstanding a nuance among their interpretations, the above human rights treaty bodies have generally supported the notion of home State obligations. Although the term 'extraterritorial' or 'extraterritorially' has been mentioned several times, those treaty bodies have in fact adopted a territorial regulation approach (due diligence approach) for home State obligations. They have not clarified when individual victims are entitled to the protection from a home State. The last chapter has filled in this gap by interpreting jurisdiction over individual victims in a host State.[764] The language used by the treaty bodies to indicate which companies should be regulated remains inconsistent. Even a certain treaty body frequently uses different language in different documents. Generally speaking, a home State is obliged to regulate companies which are registered, or domiciled, or have their main place of business in its territory, regardless of whether a potential victim is within its jurisdiction.

It should be noted that some human rights treaties contain a jurisdiction clause which indicates whose rights a State should ensure. With regard to the issue of

[764] The last chapter, at 4.2.

business and human rights, however, treaty bodies have not interpreted whether individuals located in a host State are within the jurisdiction of a home State. Instead, they emphasize a due diligence obligation of home States to regulate companies within their territory or jurisdiction (nuance of language by different treaty bodies). Therefore, human rights treaty bodies have eventually converged to a unified approach for home State obligations under different human rights treaties, with or without a jurisdiction clause.

The work of human rights treaty bodies indicates that the State due diligence obligation remains a useful approach for home State obligations concerning ordinary companies.[765] Many powerful home States (including Australia, Austria, Belgium, Canada, China, France, Germany, Italy, Korea, Norway, Singapore, Sweden, Switzerland, UK, and US) have been monitored by treaty bodies on the issue of home State obligations.[766] Treaty bodies have revealed the deficiency of those countries' regulatory frameworks and have made suggestions for them to enhance regulation. This process helps to cultivate consensus on home State obligations in international society through States' participation in reporting procedures. General Comments and Concluding Observations of human rights treaty bodies have an interpretative function, although they are not legally binding. According to the customary rules on treaty interpretation, the normative content of the general comments and concluding observations could constitute subsequent practice among State parties that tacitly agree upon them. State parties have the obligation to respond, either in a positive or negative way, to the interpretation by treaty bodies in the general comments and concluding observations. Silence of States does not prevent the general comments and concluding observations from becoming subsequent practice.

The drawback of the work of treaty bodies is that they overlooked general rules on attribution issues. Some treaty bodies have mentioned State-owned corporations, but they have not put forward a different legal basis for a home State obligation

[765] Supra note 47.
[766] Supra note 699, 702, 714, 724, 729, 734.

concerning State-owned corporations in contrast to ordinary corporations. General Comment No 23 of the CESCR is an exception, as it discusses home State obligations in relation to State-owned corporations under the concept of the obligation to respect.[767] This book has argued that the conduct of a State-owned corporation should be attributed to the home State and therefore entails its obligation to respect human rights.[768] A suggestion to treaty bodies is that more attention should be paid to State-owned corporations in their future work on business and human rights issues.

[767] Committee on Economic, Social and Cultural Rights, General Comment No 23: on the right to just and favorable conditions of work, 27 April 2016, E/C.12/GC/23, para.69.
[768] The last chapter, at 6.

Chapter 6 The Practice of China as a Home State

1. Introduction

This chapter applies the theory developed in previous chapters to analyze China's practice as a home State. For this purpose, this chapter first explains China's obligations as a home State under human rights treaties, and then it researches China's attitude towards home State obligations in human rights law and how China has regulated its overseas investments. In relation to home State obligations, China deserves special attention because of its special economic system: a communist country with elements of capitalism.[769] Central to China's economic structure is a unique duality that combines top-down State-led development with bottom-up entrepreneurial private capital accumulation.[770] China purports itself to be a developing country,[771] but it has a multitude of overseas investments. Can China shirk its responsibility by claiming itself to be a developing country? What does Article 2(3) of the ICESCR (which mentions developing countries) mean for China? Many of the Chinese overseas investments are made by State-owned corporations. China is also encouraging Chinese companies, both private and State-owned, to invest abroad under the 'One Belt, One Road' project.[772] These facts are also related to China's obligations as a home State under human rights treaties.

It has been reported by human rights NGOs that Chinese corporations abroad sometimes abuse the human rights of either employees or external stakeholders. In

[769] Sometimes it is referred to as a centrally managed capitalism. Nan Lin, *Capitalism in China: A Centrally Managed Capitalism (CMC) and Its Future*, 7 MANAGEMENT AND ORGANIZATION REVIEW 63(2010).p.63.
[770] Christopher A. McNally, *Sino-Capitalism: China's Reemergence and the International Political Economy*, 64 WORLD POLITICS 741(2012).p.744.
[771] 'Keep Development in Focus and Create Prosperity for All', the speech by Li Keqiang (China's Premier) at OECD Headquarters, Paris, 1 July 2015, available at: http://www.oecd.org/china/keep-development-in-focus-and-create-prosperity-for-all-speech-by-chinese-premier-li-keqiang.htm (last accessed 10-5-2017).
[772] The State Council of China, Action Plan on the Belt and Road Initiative, 30 March 2015, available at: http://english.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm (last accessed 9-5-2017).

the former situation, for example, some Chinese corporations do not provide adequate working conditions for their employees and some Chinese corporations hinder union activities.[773] In the latter situation, some Chinese corporations have been involved in forced evictions and some have been criticized for restricting local communities' access to water or destroying the local environment.[774] What measures does China take to address these problems? This chapter will examine and assess how China has regulated, monitored, deterred, adjudicated, or punished Chinese companies, both private and State-owned, for their human rights abuses abroad. As a preliminary search of the Chinese judicial cases database (中国裁判文书网) does not show any case concerning a foreign victim's lawsuit against a Chinese company or its subsidiary for abuse of human rights or the environment in a host State, this chapter mainly focuses on China's legislative and administrative measures.

As home State obligations for ordinary companies concern due diligence obligations to a great extent, it is highly context-dependent to assess the breach of such obligations. The author of this book acknowledges that the benchmark for due diligence obligation has not been fully developed yet, and therefore this chapter mainly conducts a policy analysis of China's regulation over overseas investments. For such a purpose, Section 2 of this chapter explains China's obligations as a home State under human rights treaties. In order to explore the entitlement links (jurisdiction over victims), it examines the general situation of Chinese overseas investments and the governmental influence by reference to open information from the government and public media. It also briefly reviews the existing research on China's investment law practice from the perspective of China as a home State. Section 3 explores China's attitude towards home State obligations by analyzing

[773] Human Rights Watch, Zambia: Workers Detail Abuse in Chinese-Owned Mines (3 November 2011), available at: https://www.hrw.org/news/2011/11/03/zambia-workers-detail-abuse-chinese-owned-mines (last accessed 20-9-2015).
[774] Amnesty International, Chinese Mining Industry Contributes to Abuses in Democratic Republic of the Congo (19 June 2013), available at: https://www.amnesty.org/en/latest/news/2013/06/chinese-mining-industry-contributes-abuses-democratic-republic-congo/ (last accessed 20-9-2015).

China's official Statements on the international stage and China's national human rights action plans. Section 4 to Section 7 examines legislative and administrative measures through a desk study of both primary sources (legal texts, governmental documents, official speeches, and news reports at the time) and secondary sources (academic articles).

2. China's Obligations as a Home State under Human Rights Treaties

2.1. Different Types of Obligations

China is a State party to six out of nine UN human rights treaties, namely the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). These treaties impose at least due diligence obligations on China as a home State in regard to ordinary companies.[775] This book has argued that whether individual victims are entitled to request protection from a home State depends on the extent that the home State has limited the regulatory power of the host State through international investment law practice.[776] The next section will reveal that individual victims in a host State are possibly within the jurisdiction of China for the purpose of seeking regulation over MNC. China has an extraterritorial obligation to respect human rights and this concerns China's State-owned corporations. This book has argued that the conduct of a State-owned corporation could be attributed to the State which has a majority ownership in the corporation.[777] If a Chinese State-owned corporation has damaged human rights in a

[775] Chapter 4, at 5.4.
[776] Chapter 4, at 4.2.
[777] Chapter 2, at 5.3.

host State, China can be responsible for the breach of the extraterritorial obligation to respect human rights. China should at least properly investigate the situation within that State-owned corporation, even if China denies that the abuse (based on preliminary evidence) has occurred.[778]

2.2. Entitlement Links: an Overview of the Governmental Influence on Chinese Overseas Investments

In order to explore the entitlement links (jurisdiction over victims), this section examines the governmental influence on Chinese overseas investments. Chinese overseas investments have increased rapidly in recent years. By the end of 2015, China's outward Foreign Direct Investment (FDI) stock had reached $1097.86 billion.[779] This figure ranked No.8 globally.[780] By the end of 2016, that figure had reached $1701.1 billion.[781] Many Chinese companies have invested in developing countries.[782] Chinese corporations have also invested heavily in transport and energy in East and South-East Asian countries such as Indonesia, Myanmar, the Philippines, and Viet Nam.[783] By the end of 2014, China's outward FDI stock in developing economies had reached $728.17 billion, accounting for 82.5% of the

[778] Chapter 4, at 6.
[779] The Chinese Ministry of Commerce, The Chinese National Bureau of Statistics, and The Chinese State Administration of Foreign Exchange, 2015 Statistical Bulletin of China's Outward Foreign Direct Investment (in both Chinese and English), available at: http://fec.mofcom.gov.cn/article/tjsj/tjgb/201609/20160901399223.shtml (last accessed 10-5-2017).
[780] Id.
[781] The Chinese Ministry of Commerce, 2016 Statistical Bulletin of China's Outward Foreign Direct Investment, available at: http://www.mofcom.gov.cn/article/tongjiziliao/dgzz/201701/20170102504421.shtml (last accessed 10-5-2017).
[782] Ifeng, Chinese Investments in Africa (4 May 2014), available at: http://finance.ifeng.com/news/special/picture42/ (last accessed 16-9-2015). On the website of the Chinese Ministry of Commerce, there is a database which provides the basic information concerning Chinese corporations investing abroad. It is possible to search the database by the country of investment destination. For example, until 16 September 2015, there have been 351 Chinese companies (in the form of subsidiaries or branches) in Nigeria and 181 in Tanzania. http://wszw.hzs.mofcom.gov.cn/fecp/fem/corp/fem_cert_stat_view_list.jsp (last accessed 16-9-2015).
[783] UN Conference on Trade and Development, World Investment Report 2015: Reforming International Investment Governance, p.44.

total.[784] Some Chinese corporations invest in the form of subsidiaries which have an independent legal capacity in a host State. Other Chinese corporations set up branches which lack an independent legal capacity in a host State. Indeed, there are considerable cases in either category of investment forms.

Chinese investments abroad are concentrated in the industry of Leasing and Business Services, Finance, Mining, Wholesale and Retail Trade, Manufacturing, Transport, Real Estate, and Construction.[785] Among them, extractive, infrastructural, and manufacturing sectors may easily have direct human rights impacts. Especially with the rapid economic growth in China, Chinese demand for resources has spurred Chinese investments abroad in the mining industry.[786] In such an industry, human rights could be seriously at risk.

Currently the Chinese government is boosting overseas investments under the 'One Belt, One Road' project. 'One Belt, One Road' is a development strategy, proposed by the People's Republic of China, which focuses on connectivity and cooperation among countries primarily in Eurasia.[787] The concept of 'One Belt, One Road' is based on the initiatives put forward by the Chinese leader XI Jinping in 2013.[788] The coverage area of the initiatives is primarily Asia and Europe. However, African countries are also included.[789] The Chinese President XI Jinping has declared that all countries can be international cooperation partners of the Belt and Road

[784] The Chinese Ministry of Commerce, The Chinese National Bureau of Statistics, and The Chinese State Administration of Foreign Exchange, 2014 Statistical Bulletin of China's Outward Foreign Direct Investment (in both Chinese and English), available at: http://fec.mofcom.gov.cn/article/tjsj/tjgb/201512/20151201223579.shtml (last accessed 10-6-2016), p.104.
[785] Id, p.108.
[786] Africa Progress Panel, Africa Progress Report 2013: Equity in Extractives, 2013, p.40.
[787] See the term on Wikipedia, available at: https://en.wikipedia.org/wiki/One_Belt,_One_Road (last accessed 18-9-2015).
[788] Xinhuanet (a Chinese State-owned news press), Chronology of China's Belt and Road Initiative (28 March 2015), available at: http://news.xinhuanet.com/english/2015-03/28/c_134105435.htm (last accessed 18-9-2015).
[789] 'Silk Road Economic Belt' and 'Maritime Silk Road' are metaphors for going out into the world, not necessarily limited to the countries along the 'Silk Road Economic Belt' and 'Maritime Silk Road' in history, which China is proud of. Actually, in the Chinese official document on 'One Belt, One Road', the word 'Africa' appears several times.

Initiatives.[790] According to the official document published by Chinese governmental organs, one of the purposes of the 'One Belt, One Road' initiatives is to encourage overseas investments, particularly in the energy and infrastructure industries.[791] The 2015 World Investment Report has estimated that China's 'One Belt, One Road' initiatives will boost more Chinese investments abroad.[792] Moreover, China has particularly encouraged its State-owned corporations to invest abroad and to become multinational corporations.[793] The 'One Belt, One Road' project may facilitate and promote more and more Chinese overseas investments, by both private and State-owned corporations, in the future.

The Chinese government has also taken preferential measures to spur overseas investments. It has established a special fund to subsidize certain overseas investments.[794] The fund is called 'the Special Fund for the Development of Foreign Trades and Investments'. The fund is operated under the rules promulgated by the central Ministry of Finance and Ministry of Commerce.[795] The rules authorize local Commissions of Commerce to deal with applications for subsidies. The fund is not only designed for foreign direct investments, but also for international trade. According to the open information published by local Commissions of Commerce, at present funding is primarily granted to the programs related to international trade, for example, international exhibitions, international

[790] Xinhuanet, Full Text of President Xi's Speech at Opening of Belt and Road Forum, 14 May 2017, available at: http://news.xinhuanet.com/english/2017-05/14/c_136282982.htm (last accessed 16-5-2017).
[791] 中国国家发展改革委、外交部、商务部:《推动共建丝绸之路经济带和 21 世纪海上丝绸之路的愿景与行动》, 2015 年 3 月. (Vision and Proposed Actions Outlined on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road, by National Development and Reform Committee, Ministry of Foreign Affairs, and Ministry of Commerce of China, March 2015).
[792] UN Conference on Trade and Development, World Investment Report 2015: Reforming International Investment Governance, p.42.
[793] 中国网:《一带一路背景下的国企走出去》, 13-02-2015. (The China Net, State-owned Corporations' 'Going Out' Strategy under the Background of the 'One Belt, One Road', 13-02-2015).
[794] 中国财政部、商务部:《外经贸发展专项资金管理办法》. (The Chinese Ministry of Finance, the Chinese Ministry of Commerce, The Rules on the Special Fund for the Development of Foreign Trades and Investments, 2014).
[795] Id.

trademark registrations and exports of certain goods.[796] However, to promote foreign direct investments is an explicit purpose of the fund and there are indeed some investment programs approved by the fund.[797] As China has put forward and substantially supported a global development strategy (the 'One Belt, One Road' initiatives), one may argue that China should at least morally provide some basic protection to individuals in a host State. It remains unclear how far has that moral duty become a matter of legal obligations.

China has paid much attention to protecting its investment interests while purporting to promote mutual benefit and win-win outcomes. In the last two decades, China has been active in concluding Bilateral Investment Treaties (BITs) with other countries in order to protect Chinese investments abroad. Uche Ewelukwa Ofodile has researched a multitude of China-Africa BITs (since 1989) and has found some interesting conclusions: China-Africa BITs (South-South BITs) contain the standard guarantees found in most Africa-North BITs (between developed countries and African countries); they do not affirm a host State's right to development, its right to regulate in the public interest or its right to pursue other social policy goals.[798] According to Ofodile's research, China-Africa BITs have reflected China's interests as a home State to a great extent while they have not left enough space for a host State's regulatory right in the public goals. According to the conclusion of Chapter 4, individual victims of corporate human rights abuses by

[796] For example, 《四川省商务厅关于中央外经贸发展资金项目评审结果的公示》, 2014. (The decision taken by the Sichuan Commission of Commerce on the programs granted by the special fund (2014), available at: http://www.sc.gov.cn/10462/10464/10727/10866/2014/12/16/10321231.shtml (last accessed 2-12-2016).) For another example, 《2014 年度上海市对外贸易发展专项资金拟支持项目公示》. (The decision made by Shanghai Commission of Commerce on the programs granted by the special fund (2014), available at: http://www.scofcom.gov.cn/zxxxgk/237431.htm (last accessed 2-12-2016).)

[797] For example, Shanxi Commission of Commerce approved a program of constructing a stadium in Cameroon in 2015. See《山西省商务厅关于对 2015 年外经贸发展专项资金（对外投资合作事项）支持项目的公示》 (The decision made by Shanxi Commission of Commerce on the programs granted by the special fund (2015), available at: http://www.docsx.gov.cn/Main/cmsContent.action?articleId=261c1ace-5c0c-4243-b51d-bd3d6288b4ef (last accessed 2-12-2016).)

[798] Uche Ewelukwa Ofodile, *Africa-China Bilateral Investment Treaties: A Critique*, 35 MICHIGAN JOURNAL OF INTERNATIONAL LAW 131(2013). p.178.

Chinese companies abroad are within the jurisdiction of China for the obligation to protect human rights, to the extent that China-foreign countries BITs have limited the regulatory power of a host State.[799] A contextual analysis of each BIT and its relevant interpretations in investment arbitration practice is always necessary to prove the jurisdictional link between China and individuals in a host State.

Some Chinese experts on international investment law have proposed to respect a host State's regulatory power in China's BIT with a foreign country. For example, Jinsong Yu has researched how to balance the rights and interests between investors and a host State in investment treaties with the background of China's 'going-out' strategy.[800] He has argued that some important clauses in BITs, such as the fair and equitable treatment, the umbrella clause, and the Most Favoured Nation clause (which are favorable to the investor) should be redesigned so as to prevent or limit the expansive interpretation by arbitration tribunals.[801] Huaqun Zeng has even argued that China should adopt a sustainable development approach in the development of its BIT model and should add home State regulation measures to the future BIT model which will guide the conclusion and amendment of China's BITs with foreign countries.[802] These scholarly proposals have pursued sustainable development in investment law practice. It has indicated that the enhancement of regulation over business is gradually becoming a trend in international investment law, and that the existing BITs between China and foreign countries need to intensify the sustainable development principle. However, it remains unclear how far that trend will become a reality. Congyan Cai has argued that the balance of host and home State interests could be potentially achieved in BITs between China and powerful economies which are both major investment sources and destinations for

[799] Chapter 4, at 4.2.
[800] 余劲松:《国际投资条约仲裁中投资者与东道国权益保护平衡问题研究》, 《中国法学》2011 年第 2 期,第 142 页. (Jinsong Yu, Balancing the Rights and Interests between Investors and a Host State in Investment Treaty Arbitration, China Legal Science, No.2, 2011, p.142.)
[801] Id, p.143.
[802] 曾华群: 《论双边投资条约范本的演进与中国的对策》, 《国际法研究》2016 年第 4 期,第 77 页. (Huaqun Zeng, On the Evolution of Bilateral Investment Treaty Models and China's Response, Chinese Review of International Law, No.4, 2016, p.77.)

each other and that it is unrealistic to make such a balance in BITs between China and developing countries.[803] Therefore, individual victims in a host State (especially those less powerful economies) are possibly within the jurisdiction of China for the purpose of seeking regulation over MNC.

2.3. China's Position on Its Status as a Developing Country

As the second largest economy in the world, China still classifies itself as a developing country.[804] This stance has been supported by the World Bank.[805] However, China's position has also been questioned, and some believe that claiming to be a developing country is an advantage to China.[806] There is no widely accepted definition of a developing country, and some have suggested to stop using the developed/developing distinction.[807] Several human rights treaties (the ICESCR, the CRC, and the CRPD) have mentioned the term 'developing country' without providing a definition. Article 2(3) of the ICESCR even provides that: 'Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.'[808] Will this article impose less duty on China than western countries as a home State of MNCs?

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[803] Congyan Cai, *China–US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12 JOURNAL OF INTERNATIONAL ECONOMIC LAW 457(2009).p.498.

[804] Chinese President XI jinping made a keynote speech at the World Economic Forum in 2017. He said that: 'China is the world's largest developing country.' The full text of this speech is available at: http://www.china.org.cn/node_7247529/content_40569136.htm (last accessed 7-5-2017).

[805] See the website of the World Bank, available at: http://www.worldbank.org/en/country/china/overview (last accessed 7-5-2017).

[806] CogitASIA, 'Developing or Developed? A China Debate by the Numbers', 19 August 2014, available at: https://www.cogitasia.com/developing-or-developed-a-china-debate-by-the-numbers/ (last accessed 7-5-2017).

[807] Tariq Khokhar and Umar Serajuddin, Should We Continue to Use the Term "Developing World"? The Data Blog of the World Bank, 16 November 2015. Tim Fernholz, The World Bank Is Eliminating the Term "Developing Country" from Its Data Vocabulary, available at: https://qz.com/685626/the-world-bank-is-eliminating-the-term-developing-country-from-its-data-vocabulary/ (last accessed 7-5-2017).

[808] International Covenant on Economic, Social and Cultural Rights, Article 2(3).

The purpose of Article 2(3) was to end the domination of certain economic groups of non-nationals during colonial times.[809] Some countries that gained independence from their colonist had very little resources, and development was their main concern. Article 2(3) permits these countries to give priority to the fulfillment of the economic rights among their own nationals.[810] Therefore, Article 2(3) should be interpreted narrowly, and it should not be used by a State to shirk its responsibility in regard to regulation over business. Given China's economic power[811] and the fact that developing countries are not clearly defined in the ICESCR and general international law, China must not use Article 2(3) to deny its obligation to regulate business for extraterritorial effects on human rights.

3. China's Attitude towards Home State Obligations in Human Rights Law

China has endorsed home State obligations in a general sense. In 2002, when the Chinese overseas investments were not as strong as today, China acknowledged and even argued for home State obligations to regulate business in a communication submitted to the WTO.[812] However, China emphasized home State obligations towards host States and did not explicitly mention human rights issue in that communication.[813] China also stressed the cooperation between a home State and a host State for the regulation over MNCs.[814] This communication alone could not prove China's commitment to home State obligations in human rights law.

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[809] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Document E/CN.4/1987/17, paras.42-44.
[810] Victor Dankwa, *Working Paper on Article 2(3) of the International Covenant on Economic, Social and Cultural Rights,* 9 HUMAN RIGHTS QUARTERLY 230 (1987).p.235.
[811] Carsten A. Holz, *China's Economic Growth 1978–2025: What We Know Today about China's Economic Growth Tomorrow*, 36 WORLD DEVELOPMENT 1665 (2008).p.1683.
[812] The WTO Working Group on the Relationship between Trade and Investment, Communication from China, Cuba, India, Kenya, Pakistan and Zimbabwe, 19 November 2002, WT/WGTI/W/152, para.21.
[813] Id.
[814] Id.

There is no official statement of China specifically on home State obligations in human rights law. When the CESCR reviewed its second periodic report, the Chinese delegation actively provided information on how China had regulated Chinese overseas investments.[815] In the dialogue between CESCR members and the Chinese delegation, a Chinese official stated that: 'Guidelines had recently been established highlighting the social and environmental responsibilities of Chinese enterprises abroad. China would continue its cooperation with African countries in a long-term and sustainable manner.'[816] China did not make a statement on the Concluding Observation made by the CESCR which advised China to fulfill home State obligations.[817] In the 31st session of the Human Rights Council, the Chinese delegation responded to the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights concerning his visit to China. The Chinese delegation stated that the: 'Chinese authority has made a series of regulations and guidelines to require Chinese companies to protect the environment, fulfill corporate social responsibility, and respect human rights in a host State.'[818] China has not denied home State obligations in human rights law in its official statements.

China has sent a positive signal of home State obligations through its national human rights action plans. China's second National Human Rights Action Plan (2012-2015) has stated that: 'China will encourage and promote the publicity of human rights knowledge in enterprises and public institutions, and develop

[815] Committee on Economic, Social and Cultural Rights, Replies of China to the list of issues, 27 January 2014, E/C.12/CHN/Q/2/Add.1, paras.3-6.
[816] Committee on Economic, Social and Cultural Rights, Summary record of the 18th meeting, 16 May 2014, E/C.12/2014/SR.18, para.14.
[817] Committee on Economic, Social and Cultural Rights, Concluding observations on the second periodic report of China, including Hong Kong, China and Macao, China, 13 June 2014, E/C.12/CHN/CO/2, para.13.
[818] 《中国代表团在人权理事会第 31 次会议与外债问题独立专家对话时作为当事国的发言》(The Chinese delegation's dialogue with the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights in the 31st session of the Human Rights Council, available at: http://www.china-un.ch/chn/dbtyw/rqrd_1/hfs_1/t1357134.htm (last accessed 11-12-2016).)

corporate cultures that honor and protect human rights.'[819] China's third National Human Rights Action Plan (2016-2020) has stated that: 'China shall urge its overseas enterprises to abide by the laws of the countries in which they are stationed, and fulfill their corporate social responsibilities.'[820] China's national human rights action plans, especially the third one, have dealt with overseas investments. It indicates that China is willing to take measures to regulate Chinese companies for their overseas human rights impacts. However, the third plan has adopted very weak language to express home State regulation, namely the term 'urge'. Furthermore, it has only mentioned its expectation for Chinese companies 'to abide by the laws of the countries in which they are stationed' and to 'fulfill corporate social responsibilities'. In short, China has generally adopted a due diligence obligation approach to home State obligations in human rights law.

4. Measures concerning Access to Justice

4.1. The Rules of Jurisdiction concerning Civil Litigation[821]

Does Chinese civil procedure law permit foreign victims to bring a lawsuit against an MNC (either a parent company registered in China or a subsidiary registered in a host State) before a Chinese court? According to the Civil Procedure Law of the People's Republic of China (the CPL), the basic principle of jurisdiction concerning civil litigation is that the court at the place of the domicile of the defendant shall have the jurisdiction over the case concerned.[822] In case of tort litigation, the court at the place where the tort occurs also has jurisdiction over the case according to Article 28 of the CPL.[823] In regard to foreign-related civil litigation, the CPL has a special rule of jurisdiction complementing Article 21 and Article 28. It provides that:

[819] National Human Rights Action Plan of China (2012-2015).
[820] National Human Rights Action Plan of China (2016-2020).
[821] The term 'jurisdiction' here is different from the term 'jurisdiction' in human rights treaties.
[822] 《中华人民共和国民事诉讼法（2012）》, 第 21 条. (Civil Procedure Law of the People's Republic of China (2012), Article 21, translated by 'pkulaw.cn').
[823] Id, Article 28.

> Where an action is instituted against a defendant which has no domicile within the territory of the People's Republic of China for a contract dispute or any other property right or interest dispute, if the contract is signed or performed within the territory of the People's Republic of China, the subject matter of action is located within the territory of the People's Republic of China, the defendant has any impoundable property within the territory of the People's Republic of China, or the defendant has any representative office within the territory of the People's Republic of China, the people's court at the place where the contract is signed or performed, where the subject matter of action is located, where the impoundable property is located, where the tort occurs or where the domicile of the representative office is located may have jurisdiction over the action. [824]

If a corporation domiciled in China sets up a branch (which lacks a legal personality) abroad and the branch abuses human rights in that country, the Chinese court shall have jurisdiction over the case against the corporation domiciled in China. If a corporation domiciled in China sets up a subsidiary (which has a legal personality) abroad and the subsidiary abuses human rights in that country, the Chinese court does not have jurisdiction over the case against the subsidiary which is domiciled abroad, unless the subsidiary happens to have impoundable property or a representative office in China according to Article 265 of the CPL.[825] However, a Chinese court may still have jurisdiction over the case against the parent company which is domiciled in China. Theoretically, a victim from abroad can at least sue a parent company domiciled in China for its failure to control its subsidiary's conduct. Whether a victim can win such a lawsuit depends on China's private international law and civil law code, which will be discussed later in this chapter.

The CPL does not have a rule of *forum necessitates*, nor does it allow a judge to decide the issue of jurisdiction at his discretion. However, Chinese scholars have already been active in advocating the principle of *forum necessitates*. The China

[824] Id, Article 265.
[825] Id.

Society of Private International Law has published a model law of private international law, Article 52 of which provides that: 'The Chinese court shall have jurisdiction over an action instituted by a plaintiff when no other court is able to provide judicial remedy to the plaintiff.'[826] Some other scholars have drafted a proposal for principles of international civil litigation. The proposal has allowed a judge to exercise discretion with regard to the issue of jurisdiction. Principle 5 of that proposal concerns the principle of adequate forum. Principle 5 states that: 'Chinese court should properly exercise jurisdiction in international civil litigation in accordance with the current rules. In case of a lack of explicit rules concerning jurisdiction, a court should make a decision on its own. When making such a decision, the court should take into account the following elements: … (3) The necessity for a person to get remedy…'[827] Therefore, Chinese scholars have put forward a flexible rule of jurisdiction for international civil litigation and they have paid much attention to access to remedies in international civil litigation. According to the above academic proposals, a corporate victim abroad could bring a lawsuit against a subsidiary (domiciled in a host State) of a Chinese company (domiciled in China) before a Chinese court, which is not allowed by the current CPL.

4.2. Legal Assistance

If victims of corporate human rights abuses want to bring a lawsuit against an MNC before a Chinese court, they may need a lawyer to help them. According to the CPL, a plaintiff is required to prepay the litigation fee. If foreign victims cannot afford to hire a lawyer or prepay a litigation fee, can they get assistance from government? It is an important aspect of procedural rights to get a legal assistance from the government when an individual cannot afford to take part in a lawsuit. China's

[826] 中国国际私法学会:《中华人民共和国国际私法示范法（第六稿）》, 法律出版社 2000 版, 第 114 页. (The China Society of Private International Law, Model Law of Private International Law of the People's Republic of China (the sixth edition), Beijing: Law Publisher, 2000, p.114).

[827] 何其生、万钧等:《中国国际民事诉讼原则（建议稿）》,《武大国际法评论》第 18 卷第 2 期,2015,第 22 页. (Qisheng He, Jun Wan and others, Chinese Principles of International Civil Litigation (drafted proposal), Wuhan University International Law Review, 18 (2), 2015, p.22).

legal assistance regime includes judicial assistance and administrative assistance (legal assistance in a general sense). This section examines whether China's legal assistance regime constitutes a procedural obstacle for a foreign victim to sue an MNC in China.

4.2.1. Judicial Assistance

In 2005, the Chinese Supreme Court published the 'Provisions of the Supreme People's Court on Providing Legal Assistance for Litigants with Confirmed Financial Difficulties' (the 2005 provisions).[828] The purpose of the 2005 provisions is to enable litigants with confirmed financial difficulties to exercise their right to litigation and to protect their procedural rights. Article 2 of the 2005 provisions provides that: 'The legal assistance mentioned in the present Provisions refers to the delaying, reduction, and exemption of litigation fees for those who filed civil or administrative litigations at the people's court to protect their legal rights, but who suffered confirmed financial difficulties.'[829] According to the 2005 provisions, litigants of all kinds of civil litigation can apply for the delaying, reduction and exemption of litigation fees provided they can prove that they have suffered confirmed financial difficulties. The 2005 provisions apply to all litigants, citizens or foreigners. Therefore, a foreign litigant can also apply for the benefit as long as he can prove his financial difficulties.

4.2.2. Administrative Assistance (Legal Assistance in a General Sense)

The content of the above-mentioned judicial assistance is very narrow, which only covers litigation fees. In the discourse of business and human rights, many victims are low income persons or disadvantaged groups, and they may also need a government paid lawyer to help them with their litigations against MNCs. The

[828] 中国最高人民法院:《关于对经济确有困难的当事人提供司法救助的规定》, 法发[2005]6 号. (The Chinese Supreme Court, Provisions of the Supreme People's Court on Providing Legal Assistance for Litigants with Confirmed Financial Difficulties, [2005]6).
[829] Id, Article 2.

Chinese State Council has promulgated a regulation on legal assistance.[830] This regulation has clarified that it is the responsibility of the government to provide legal assistance.[831]

Article 2 of the regulation states that: 'Any and all citizens that meet the requirements as provided for in the present Regulation shall be entitled to obtain gratuitous legal services according to the present Regulation, including legal consultation, agency, criminal defense, etc.' [832] This regulation only explicitly mentions the Chinese citizens. But, according to Chinese Civil Procedure Law, a foreigner shall have the same procedural rights and obligations with citizens. Therefore, a foreigner could also get legal assistance including a government paid lawyer from the Chinese government according to Chinese law. In fact, many foreigners have already received legal assistance from the Chinese government in their criminal procedures.[833] There are still rare reports on foreigner's having legal assistance in a civil procedure. In any case, there is no legal obstacle for a foreigner to have legal assistance in a civil procedure.

The regulation has a limitation on the types of civil litigation for which a person can apply for legal assistance. Article 10 provides that: 'In any of the following situations where any citizen cannot afford a lawyer due to economic difficulties, he or she may apply to a legal assistance institution for legal assistance: (1) Requesting State compensations; (2) Requesting social insurance; (3) Requesting survivor's pensions or relief funds; (4) Requesting a maintenance; (5) Requesting labor remunerations; (6) Claiming civil rights and interests arising from a brave act of righteousness.'[834] These types of civil litigation cannot meet the need of victims of

[830] 中国国务院:《法律援助条例》, 2003. (The Chinese State Council, the Regulation on Legal Assistance, 2003, translated by 'pkulaw.cn').
[831] Id, Article 3.
[832] Id, Article 2.
[833] 练情情:《符合条件外国人可申请法律援助》,《广州日报》2011 年 8 月 4 日. (QingQing Lian, Qualified Foreigners Could Apply for Legal Assistance, Guangzhou Daily, 4 August 2011.)
[834] 中国国务院:《法律援助条例》, 2003. (The Chinese State Council, the Regulation on Legal Assistance, 2003), Article 10.

corporate human rights abuses. However, Article 10 also empowers local governments to make supplementary provisions in order to provide legal assistance for other types of civil litigation.[835] Therefore, the regulation of the central government sets a minimum standard for the types of civil litigation that qualify for legal assistance. Local governments are empowered to broaden the scope of legal assistance matters. In practice, most local governments have already expanded the types of litigation so as to include all labor disputes and/or environmental disputes.

Table 4: The Expanded Types of Civil Litigation that Qualify for Legal Assistance According to Local Regulations in Mainland China[836]

Name of Province or City	The Year of the Newly Revised Regulation	The Expanded Types of Civil Litigation	Related Provisions
Guangdong	2016	All civil litigations	Art.11
Shanxi(山西)	2015	Labor and Environmental Disputes	Art.9
Chengdu	2015	Labor and Environmental Disputes	Art.12
Shandong	2015	All civil litigations	Art.8
Wuhan	2015	Labor Dispute	Art.10

[835] Id.

[836] In China's legal system, every province or autonomous region or municipality directly under the central government has the power to make local regulations to the extent that is permitted by the Constitution and law. Some big cities also have the same power. This table includes information on all provinces, autonomous regions and municipalities in mainland China, and on some big cities that have already promulgated regulations on legal assistance. The data come from the database of pkulaw, available at: www.pkulaw.cn (last accessed 8-8-2016).

Neimenggu	2015 and 2010	Labor and Environmental Disputes	Art.4 (2015) Art.8 (2010)
Fuzhou	2014	Labor and Environmental Disputes	Art.10
Taiyuan	2014	Labor and Environmental Disputes	Art.12
Hainan	2014	High-risk operations and Environmental Disputes	Art.10
Chongqing	2014	Labor Dispute	Art.10
Sichuan	2014	Labor and Environmental Disputes	Art.9
Jiangxi	2013	Labor and Environmental Disputes	Art.9
Dalian	2013	Labor and Environmental Disputes	Art.10
Chengdu	2011	Labor and Environmental Disputes	Art.12
Hubei	2011	Labor and Environmental Disputes	Art.10
Gansu	2011	Labor Dispute	Art.6
Hunan	2011	Labor and Environmental Disputes	Art.8
Xiamen	2011	Labor Dispute	Art.11

Henan	2010	Labor Dispute	Art.11
Guangxi	2010	Labor Dispute	Art.7
Yunnan	2010	Labor Dispute	Art.7
Fujian	2010	All civil litigations	Art.11
Zhejiang	2009	Labor Dispute	Art.9
Anhui	2009	Labor Dispute	Art.11
Guizhou	2009	Labor and Environmental Disputes	Art.11
Haikou	2009	Labor and Environmental Disputes	Art.8
Shenzhen	2008	All civil litigations	Art.12
Beijing	2008	Labor Dispute	Art.9
Hangzhou	2008	Labor Dispute	Art.14
Shanxi(陕西)	2008	Labor Dispute	Art.10
Hebei	2007	Labor Dispute	Art.7
Ningxia	2006	Labor Dispute	Art.10
Shanghai	2006	Labor Dispute (This regulation states that the government shall gradually expand the coverage of legal assistance)	Art.5
Jiangsu	2005	Labor Dispute	Art.10

Tianjin	2004	No expanded type	
Qinghai	2004	Labor Dispute	Art.9
Liaoning	2004	Labor and Environmental Disputes	Art.7
Xinjiang	2006	Labor and Environmental Disputes	Art.7
Heilongjiang	2001	No expanded type	
Jilin		No local regulation on legal assistance	
Tibet		No local regulation on legal assistance (But the local government has a legislative plan)	

Most local regulations have permitted individuals to apply for legal assistance for at least labor disputes. A large number of local regulations have already covered both labor and environmental disputes. Guangdong, Shandong, and Fujian have even opened up legal assistance for all kinds of civil litigations. Legal assistance should be requested at the legal assistance organ which is located in the place of the potential court of a lawsuit. The legal assistance policies of the following places are particularly important for victims of corporate abuse, because most Chinese oversees investments are from these places: Beijing, Guangdong, Zhejiang, Jiangsu, Shanghai, Shandong, and Liaoning.[837] The above table indicates that Guangdong,

[837] The Chinese Ministry of Commerce, The Chinese National Bureau of Statistics, and The Chinese State Administration of Foreign Exchange, 2014 Statistical Bulletin of China's Outward Foreign Direct Investment (in both Chinese and English), available at:

Shandong, Fujian, and Liaoning have included labor and environmental disputes in their legal assistance policies, which could generally meet the needs of a victim of a corporate abuse. Zhejiang, Jiangsu, Shanghai, and Beijing, whose regulations were promulgated prior to 2009, have at least covered labor disputes in their legal assistance policies. Since 2010, it has become a trend that local governments would cover both labor and environmental disputes in their legal assistance policies. We can anticipate that Zhejiang, Jiangsu, Shanghai, Beijing and other places will add environmental disputes to their legal assistance policies when they revise their regulations.

Generally speaking, the Chinese legal assistance regime does not constitute a procedural obstacle for a foreign victim to sue an MNC in China. In the future, China could continue to perfect its legal assistance regime and make it more transparent and easily accessible to foreign victims of a corporate abuse. For example, administrative organs in charge of legal assistance could build their English websites to make their regulations and policies known to foreigners.

4.3. Human Rights NGOs in China

Although governmental legal assistance is open to foreigners, not everybody can get it. Some victims of corporate abuses may need help from human rights NGOs to sue an MNC before a Chinese court. Does Chinese domestic law permit activities of human rights NGOs? Can a human right NGO from abroad be registered in China? Is it possible for a victim of a corporate human rights abuse to get legal assistance from NGOs?

4.3.1. Domestic Human Rights NGOs

The foundation and activity of NGOs are governed by two regulations of the State Council. The first one is the Regulation on Registration and Administration of

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http://fec.mofcom.gov.cn/article/tjsj/tjgb/201512/20151201223579.shtml (last accessed 10-6-2016), p.101.

Social Organizations (the first regulation).[838] The second one is the Interim Regulation on Registration and Administration of Private Non-Enterprise Entities (the second regulation).[839] An NGO must be registered according to either the first or the second regulation before it can undertake activities. According to those two regulations, an NGO should be registered before the Ministry of Civil Affairs (for those nationwide NGOs) or a local Civil Affairs Department (for those local NGOs). It should be noted that those two regulations do not apply to NGOs that only act within a State organ, an enterprise or other legal entity.

Those two regulations permit activities of human rights NGOs, but their foundation is subject to the approval of a governmental organ.[840] This restriction may not only influence and even violate the freedom of association,[841] but it may also affect business victims' access to NGOs. Will that restriction substantially hinder corporate victims' access to NGOs? From other legislation and governmental statements, we can find that the restriction on NGOs' activities is for fear that NGOs would threaten the Chinese Communist Party's ruling position or the so-called people's democratic dictatorship according to the Chinese Constitution. In 2016, for example, the Chinese Congress passed a law on the administration of activities of foreign NGOs, which will enter into force on 1 January 2017.[842] This law generally permits foreign NGOs to undertake many kinds of activities in China,

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[838] 中国国务院:《社会团体登记管理条例》, 1998 (2016 修订). (The Chinese State Council, the Regulation on Registration and Administration of Social Organizations, issued on 25-10-1998, revised in 2016).

[839] 中国国务院:《民办非企业单位登记管理暂行条例》, 1998. (The Chinese State Council, the Interim Regulation on Registration and Administration of Private Non-Enterprise Entities, 1998).

[840] 中国国务院:《社会团体登记管理条例》, 1998 (2016 修订). (The Chinese State Council, the Regulation on Registration and Administration of Social Organizations, issued on 25-10-1998, revised in 2016), Article 3. 中国国务院:《民办非企业单位登记管理暂行条例》, 1998. (The Chinese State Council, the Interim Regulation on Registration and Administration of Private Non-Enterprise Entities, 1998), Article 3.

[841] Whether such a restriction violates the freedom of association is definitely an important question, but this is not the topic of this book.

[842] 《中华人民共和国境外非政府组织境内活动管理法》, 28-04-2016. (Law of the People's Republic of China on the Administration of Activities of Foreign Non-Governmental Organizations within the Territory of China, 28-04-2016).

but it explicitly prohibits them from being involved in political or religious activities in China.[843] Therefore, the real purpose of the above restriction is to prevent NGOs from undertaking political or religious activities which the Chinese Communist Party thinks would directly threaten its ruling power.

By contrast, the Chinese government is more tolerant and even willing to see the existence of NGOs which are engaged in environmental protection, labor protection or poverty eradication. The Chinese government has even encouraged NGOs to provide legal assistance to disadvantaged groups. For example, the Ministry of Environmental Protection published a guiding principle in 2010 to promote the role of NGOs in environmental protection, including providing legal assistance to disadvantaged groups.[844] In reality, there are several NGOs active in providing legal assistance for environmental or labor related issues. Among them, '中华环保联合会' (the All-China Environment Federation), '北京义联劳动法援助与研究中心' (Beijing Yilian Institute for Labor Law Assistance), and '污染受害者法律帮助中心' (the Center for Legal Assistance to Pollution Victims) are very active. These NGOs provide free legal assistance to disadvantaged groups. For instance, the All-China Environment Federation, which is registered by the Ministry of Civil Affairs, helped three pollution victims to bring a lawsuit against polluters.[845] The Center for Legal Assistance to Pollution Victims, which was organized by professors and students from the China University of Political science and Law in 1999, provided free legal assistance to more than 600 cases concerning environmental pollution by 2015.[846] This NGO's registration information cannot be found on governmental

[843] Id, Article 5.
[844] 中国环境保护部:《关于培育引导环保社会组织有序发展的指导意见》, 环发[2010]141 号, 10-12-2010. (The Chinese Ministry of Environmental Protection, the Guiding Principles on Promoting the Development of Environmental NGOs, document no. [2010]141, 10-12-2010).
[845] 中华环保联合会:《我会联合自然之友共同召开 2015 年环境权益维护实践情况通报会》, 18-03-2016. (The All-China Environment Federation, Joint Briefings with 'the Friends of Nature' on Activities in 2015, 18-03-2016, available at: http://www.acef.com.cn/news/lhhdt/2016/0318/18952.html (last accessed 10-08-2016).)
[846] 大众网:《一民间法律援助中心深味环保官司难打: 污染受害者如何有力量?》, 25-04-2015. (Dazhong Net, A NGO's Feeling for Difficulties of Environment Lawsuits: How to Make Pollution Victims More Powerful? Available at:

websites for NGO's registration information. Perhaps this NGO considers itself as 'an NGO that only acts within a State organ, an enterprise or other legal entity', which does not need to be registered. However, its activities have exceeded the scope of the China University of Political Science and Law, because it has been involved in environmental lawsuits across the nation. The Chinese government has never punished this NGO for not being registered. On the contrary, its director Professor *Wang Canfa* was the recipient of a governmental award in 2005 for his work in that NGO.[847] Again, this indicates that the Chinese government is willing to support the existence of NGOs that support victims to sue a company.

It has been reported that the Chinese government is unfriendly to human rights activities or human rights lawyers.[848] Indeed, the author can find only one NGO whose name includes the key word 'human rights' (中国人权发展基金会, the China Foundation for Human Rights Development) and, in fact, this NGO has a governmental background. Human rights activities have two aspects: claiming a right against a government and claiming a right against a private actor such as an MNC. The Chinese government may dislike the first aspect of human rights activities. However, the Chinese government is tolerant or even friendly towards NGO's legal assistance for civil litigation which concerns human rights or environment. Thus, NGOs are available for victims of corporate human rights abuses to sue an MNC in China. A strategy for such an NGO is to avoid using the keyword 'human rights' in their names to avert unnecessary trouble.

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http://www.dzwww.com/shandong/sdnews/201504/t20150425_12286047.htm (last accessed 11-08-2016).)

[847] 中国环境保护部:2005 绿色中国年度人物:王灿发教授. (The Chinese Ministry of Environmental Protection, Green China Person of 2005: Professor Wang Canfa, available at: http://www.zhb.gov.cn/home/ztbd/shbz/ndrw/2005/201004/t20100428_188858.shtml (last accessed 11-08-2016).)

[848] Amnesty International, China's Crackdown on Human Rights Lawyers, available at: https://www.amnesty.org/en/latest/campaigns/2016/07/one-year-since-chinas-crackdown-on-human-rights-lawyers/ (last accessed 11-08-2016).

4.3.2. Human Rights NGOs from Abroad

The new law on the administration of activities of foreign NGOs generally permits them to undertake activities in China, but it specifically forbids them to be involved in political or religious activities.[849] According to this law, registration is necessary for a foreign NGO to establish a branch in China. A precondition for registration is that the candidate NGO should be approved by a governmental organ. Some may worry that such a registration procedure would keep foreign human rights NGOs outside of China. When that law was enacted, the Chinese Congress held a press conference. A reporter from the British Broadcasting Corporation (BBC) asked whether foreign human rights NGOs could undertake activities in China. A Chinese official answered that: 'Yes, of course. Foreign human rights NGOs can undertake activities in China. We welcome all foreign NGOs to China and support them to communicate and cooperate with China in a friendly way. Their rights are protected by law. But they should adhere to Chinese law and any breach of law will be punished.'[850] This indicates that foreign NGOs will soon be available to help victims of corporate human rights abuses. Victims would possibly get help from those NGOs to bring a lawsuit against an MNC before a Chinese court.

NGOs from abroad, especially those international NGOs such as Human Rights Watch and Greenpeace, may have branches in different countries. Their objective is to find evidence of corporate human rights abuses in a host State with the help of their branches around the world. They have a disadvantage however that they may not be familiar with Chinese law or how to negotiate with relevant parties in China. However, this disadvantage may be overcome by cooperating with a Chinese domestic NGO. Therefore, foreign NGOs and Chinese NGOs could cooperate to better help foreign victims of a corporate human rights abuse.

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[849] 《中华人民共和国境外非政府组织境内活动管理法》, 28-04-2016. (Law of the People's Republic of China on the Administration of Activities of Foreign Non-Governmental Organizations within the Territory of China, 28-04-2016).

[850] 凤凰网:《全国人大回应境外 NGO 能否在中国做人权工作》, 28-04-2016. (Ifeng.com, the Chinese Congress responded to the question of whether foreign human rights NGOs can undertake activities in China, 28-04-2016, available at: http://news.ifeng.com/a/20160428/48623746_0.shtml (last accessed 11-08-2016).)

5. Relevant Legislation for Ordinary Companies

5.1. Corporate Social Responsibility under Chinese Company Law

Chinese company law has specifically mentioned corporate social responsibility (CSR) since 2005. Article 5(1) states that: 'When conducting business operations, a company shall comply with laws and administrative regulations, social morality, and business morality. It shall act in good faith, accept the supervision of the government and general public, and bear social responsibilities.'[851] There is not a definition of corporate social responsibility in this law. Research shows that what China thinks of corporate social responsibility is different from the opinions in western countries: China tends to disregard human rights aspect of corporate social responsibility.[852] Indeed, China puts more emphasis on developmental aspects of corporate social responsibility, such as to promoting employment and economic development.[853]

There are some debates on the legal nature of the above provision on CSR among Chinese scholars. Some scholars think that the above provision on CSR only has a persuasive function and cannot be enforced by a court.[854] More and more scholars argue that corporate social responsibility under company law should be judicially

[851] 《中华人民共和国公司法(2013 修订)》(Company Law of the People's Republic of China (2013 Amendment), translated by 'pkulaw.cn').
[852] Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Structural Change*, 28 BERKELEY JOURNAL OF INTERNATIONAL LAW 64(2010). p.66.
[853] 深圳证券交易所:《上市公司社会责任指引》, 2006. (Shenzhen Stock Exchange, Social Responsibility Instructions to Listed Companies, 2006.
[854] 朱慈蕴:《公司的社会责任:游走于法律责任与道德准则之间》, 《中外法学》2008 年第 1 期, 第 32 页. (Ciyun Zhu, Corporate Social Responsibility: Between Legal Responsibility and Moral Norms, Peking University Law Journal, 2008, No.1, p.32.) 王立兵:《公司社会责任的双重属性及其实现途径——以<公司法>第 5 条第 1 款为中心》, 《学术交流》2012 年第 1 期, 第 66 页. (Libing Wang, the Dual Function of Corporate Social Responsibility and the Way to Fulfil It: On the Basis of Article 5(1) of the Company Law, Academic Exchange, 2012, No.1, p.66.)

enforceable.[855] In China's judicial practice, there has not been any case (even in purely domestic cases) in which a court directly enforces corporate social responsibility. Chinese courts seem reluctant to enforce Article 5(1), which lacks concrete content and a precise definition of corporate social responsibility. Article 5(1) of the Chinese company law provides an opportunity for Chinese courts to enforce corporate social responsibility, including when they face cases concerning Chinese overseas investments.

Although corporate social responsibility has not been enforced before a Chinese court, Chinese company law has played an important role in promoting the notion of CSR since 2005, when the concept of CSR was first inserted into Chinese company law. For example, in 2006, the Shenzhen Stock Exchange formulated instructions in accordance with Chinese company law to encourage listed companies to fulfill CSR and to release CSR reports.[856] The CSR referred to by the Shenzhen Stock Exchange mainly includes labor rights, consumer protection, environmental protection, and public welfare activities such as education, culture, science, and public health.[857] In 2008, the Shanghai Stock Exchange also encouraged listed companies to fulfill CSR and to release CSR reports.[858] In reality,

[855] 罗培新:《我国公司社会责任的司法裁判困境及若干解决思路》, 《法学》2007 年第 12 期, 第 70 页. (Peixin Luo, the Obstacles for the Judicial Review of Corporate Social Responsibility in China and the Possible Solutions, Legal Science, 2007, No.12, p.70.) 楼建波:《中国公司法第五条第一款的文义解释及实施路经》, 《中外法学》2008 年第 1 期, 第 42 页. (Jianbo Lou, the Literal Interpretation of Article 5(1) of the Chinese Company Law and Its Application, Peking University Law Journal, 2008, No.1, p.42.) 郭秀华:《公司社会责任条款司法适用之法理分析》,《法学》2011 年第 2 期, 第 77 页. (Xiuhua Guo, the Legal Basis for the Judicial Application of the Corporate Social Responsibility Provision, Legal Science, 2011, No.2, p.77.)

[856] 深圳证券交易所:《上市公司社会责任指引》, 2006. (Shenzhen Stock Exchange, Social Responsibility Instructions to Listed Companies, 2006. This document was replaced by the Guidelines of the Shenzhen Stock Exchange for Standardized Operation of Companies Listed on the Main Board and the Guidelines of the Shenzhen Stock Exchange for Standardized Operation of Companies Listed on the Small and Medium-Sized Enterprise Board in 2010.)

[857] Id.

[858] 上海证券交易所:《关于加强上市公司社会责任承担工作暨发布<上海证券交易所上市公司环境信息披露指引>的通知》, 2008. (Shanghai Stock Exchange, Improving

most listed companies have released CSR reports following the guidelines of the Shanghai or Shenzhen Stock Exchange.[859] In addition to these self-regulations within the stock exchange, governmental organs (such as the SASAC and China Banking Regulatory Commission) have also promoted CSR in their regulatory practice, which will be discussed in other parts of this chapter. Since 2005, the Chinese government has been sending signals through many channels that CSR is an appropriate and desired activity.[860]

5.2. Chinese Criminal Law

According to Article 30 of the Chinese criminal law code, corporations themselves are punishable provided they commit an act that is specifically qualified as a crime by a corporation. Article 7 of the Chinese criminal law code deals with personal jurisdiction, which provides that: 'This Law is applicable to the citizens of the People's Republic of China who commit crimes prescribed in this Law outside the territory of the People's Republic of China...'[861] Article 7 and Article 30 indicate that only individuals are punishable for their extraterritorial conduct. Chinese criminal law does not directly penalize corporate extraterritorial conduct. As a home State, China has due diligence obligations to regulate corporations registered or seated in its territory for their extraterritorial conduct. The Chinese legislature should consider regulating corporate extraterritorial conduct through criminal law. For the time being, directors or managers of an overseas company, if they are Chinese citizens, are still punishable for certain crimes such as forced labor or industrial accident.[862] Therefore, the Chinese criminal law has already provided a mechanism to deter corporate human rights abuses abroad. This mechanism should be utilized by the Chinese authority to punish a director or manager for corporate human rights abuses abroad.

Corporate Social Responsibility among Listed Companies and the Guidelines on Releasing Environmental Information by Listed Companies, 2008.)

[859] Christopher Marquis & Cuili Qian, *Corporate Social Responsibility Reporting in China: Symbol or Substance?*, 25 ORGANIZATION SCIENCE 127(2014). p.128.

[860] Id, p.130.

[861] 《中华人民共和国刑法》(Chinese Criminal Law Code, Article 7).

[862] Id, Article 244, Article 134, Article 135.

5.3. Is Parent Company's Liability Possible under China's Domestic Law?

The UK *Chandler v Cape plc* case has clarified that a parent company can be responsible for conduct of its subsidiaries without piercing the corporate veil, because a parent company owes a duty of care to the victim of its subsidiary's tort.[863] Theoretically, Chinese tort law also supports such an interpretation. Article 6(1) of Chinese tort law provides that: 'One who is at fault for infringement upon a civil right or interest of another person shall be subject to the tort liability.'[864] Chinese tort law does not make a delict (action or omission) a precondition for a tort liability. According to the mainstream Chinese tort law theory, a tort liability is not conditioned by a specific form of delict and a parent company's duty of care can be inferred from Article 6(1).[865] However, there is no real case concerning a parent company's duty of care before a Chinese court and it is unclear what the legal consequence would be if a parent company breaches its duty of care.

What would be the result if a victim from a host State brings a lawsuit against a parent company domiciled in China for its breach of duty of care before a Chinese court? First of all, a Chinese court has jurisdiction over the case because the defendant is domiciled in China. Second, the court should decide which country's law shall apply in this case according to Chinese private international law. According to Article 44 of the Chinese private international law code, the law of the country where a tort takes place shall apply in a tort dispute. Therefore, the result of the case depends on the law of the host State: if the host State law requires a duty of

[863] UK Court of Appeal (Civil Division), David Brian Chandler v Cape Plc, [2012] EWCA Civ 525, para.80.

[864] 《中华人民共和国侵权责任法》, 2009. (Tort Law of the People's Republic of China, 2009, translated by 'pkulaw.cn')

[865] 张民安:《论不作为过错的侵权责任》,《法制与社会发展》2002 年第 5 期,第 84 页. 周友军:《我国侵权法上作为义务的扩张》,《法学》2008 年第 2 期,第 96 页. 王利明:《我国<侵权责任法>采纳了违法性要件吗?》,《中外法学》2012 年第 1 期,第 7 页. (Min'an Zhang, On the Tort Liability for Omissions, Law and Social Development, No.5, 2002, p.84. Youjun Zhou, The Expansion of Positive Obligations under the Chinese Tort Law, Law Science, No.2, 2008, p.96. Liming Wang, Is a Delict Necessary under Chinese Tort Liability Law? Peking University Law Journal, No.1, 2012, p.7.)

care of a parent company, the Chinese court would also support such a duty and vice versa. However, as China has a territorial obligation to regulate the extraterritorial conduct of corporate nationals (due diligence obligation) under human rights law, China should make sure the application of Chinese private international law is compatible with its human rights obligations. A possible solution could be that when the proper law of a tort denies the duty of care of a parent company, the Chinese court should apply Chinese tort law and interpret it in a way that supports the duty of care of a parent company.

6. Administrative Regulations on Ordinary Companies

6.1. The Regulations and Measures of the Ministry of Commerce

The Chinese Ministry of Commerce (MOC) is in charge of the promotion and supervision of Chinese overseas investments.[866] The MOC has promulgated regulations and guiding principles on overseas investments, some of which have directly or indirectly involved human rights aspects.

6.1.1. Endorsement of the Guide on Corporate Social Responsibility for Chinese International Contractors by the China International Contractors Association

The MOC endorsed the Guide on Corporate Social Responsibility for Chinese International Contractors developed by the China International Contractors Association in 2012.[867] The Guide applies to all relevant activities of Chinese enterprises operating overseas contracting projects, as well as all relevant activities

[866] 中国国务院:《商务部主要职责内设机构和人员编制规定》, 22-11-2006. (The Chinese State Council, the Provisions on the Duty, Internal Organs and Staff of the Ministry of Commerce, 22-11-2006.)
[867] 中国商务部:《对外承包工程行业社会责任指引正式发布》, 2012. (The Chinese Ministry of Commerce, the Release of the Guide on Social Responsibility for Chinese International Contractors, 2012.)

conducted in China that support overseas contracting projects.[868] The Guide is to be used as a guidance document for Chinese international contractors establishing corporate social responsibility systems, advancing corporate social responsibility management, disclosing corporate social responsibility information, and continuously improving corporate social responsibility performance.[869] The endorsement of the guide by the MOC indicates that it has paid attention to the corporate social responsibility of Chinese companies.

6.1.2. The Guiding Principles on Environmental Protection in Overseas Investments

The MOC issued its own Guiding Principles on Environmental Protection in Overseas Investments in 2013.[870] The purpose of the guiding principles is to encourage and to guide Chinese companies to fulfill corporate social responsibility on environmental protection, so as to build a good reputation for Chinese companies.[871] The MOC encourages Chinese companies to follow the guiding principles on a voluntary basis.[872] Among others, the guiding principles include the following recommendations: Enterprises should learn and obey the environmental law of host States; when building and operating a project, enterprises should apply for permission in accordance with local laws; enterprises should conduct environmental impact assessments (EIA) before starting a business according to local laws and should take reasonable measures to mitigate negative effects revealed by the EIA; enterprises should provide training on environmental protection to their employees; enterprises should dispose of waste in accordance with local laws; enterprises should monitor their pollution and store data; enterprises should have plans for potential environmental accidents and should

[868] The China International Contractors Association, the Guide on Social Responsibility for Chinese International Contractors, 2012, Article 1.1.
[869] Id, Article 1.2.
[870] 中国商务部:《对外投资合作环境保护指南》, 2013. (The Chinese Ministry of Commerce, the Guiding Principles on Environmental Protection in Overseas Investments, 2013.)
[871] Id, Article 1.
[872] Id, Article 2.

disclose information immediately after an accident; enterprises are encouraged to purchase insurance to disperse environmental risks. The guiding principles indicate that China has paid attention to environmental influences abroad by its corporate nationals. But the MOC only takes persuasive measures rather than legally binding measures.

6.1.3. The Regulation on the Supervision of Overseas Investments

In 2014, the MOC promulgated the Regulation on the Supervision of Overseas Investments, which is a general regulation on overseas investments.[873] In the first part entitled 'general principles' of this regulation, it requires a Chinese company to obey international treaties to which China is a party when conducting overseas investments.[874] In fact, China has joined many human rights treaties, including several International Labour Organization Conventions. Although China remains reluctant to allow the application of international human rights law in its domestic courts,[875] the MOC, as an administrative body, has actively pushed forward the observance of human rights treaties by Chinese companies making overseas investments. If a Chinese company violates a treaty to which China is a party, according to the MOC's regulation, it cannot enjoy the benefits provided by the government within three years.[876] The legal consequence of violating a treaty by a Chinese company is still very weak, because the MOC's power is very limited. According to the law on legislation, the MOC (as a subordinate body of the State council) rules shall not set out any requirements that impair the rights or increase the obligations of citizens, legal persons, and other organizations without any basis

[873] 中国商务部:《境外投资管理办法》, 2014. (The Chinese Ministry of Commerce, the Regulation on the Supervision of Overseas Investments, 2014.)
[874] Id, Article 4.
[875] Congyan Cai, *International Law in Chinese Courts during the Rise of China*, 110 AMERICAN JOURNAL OF INTERNATIONAL LAW 269(2016). p.284.
[876] 中国商务部:《境外投资管理办法》, 2014, Article 32. (The Chinese Ministry of Commerce, the Regulation on the Supervision of Overseas Investments, 2014.)

in laws or the administrative regulations, decisions and orders of the State Council.[877]

This regulation also specifically requires companies registered in China to ensure that their overseas subsidiaries obey local laws, respect local customs, discharge corporate social responsibility, and protect the local environment and labor regulations.[878] If they fail to do so, they cannot enjoy the benefits provided by the government within three years.[879] However, the regulation has not specified how to monitor the fulfillment of corporate social responsibility by Chinese overseas investments. In reality, it is difficult to find a real case in which the MOC has punished a Chinese company which failed to ensure that its overseas subsidiaries fulfill corporate social responsibility. From a press release by the MOC on the eve of the regulation, we can infer that the main purpose of the MOC is to urge or to guide Chinese companies to fulfill corporate social responsibility abroad rather than ordering or requiring them to do so.[880] Therefore, although the MOC has mentioned CSR, environmental and labor protection and it has even required a Chinese company to obey international treaties to which China is a party, its enforcement measures are weak due to its limited power as a subordinate body of the State council.

The MOC has for a long time been engaged in trade and investment negotiations with other States, and it is also in charge of litigation before the WTO, and therefore its officials could be easily informed of new developments of international law. The 2014 regulation indicates that the MOC is willing to respond to the new development of business and human rights issues.

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[877] 《中华人民共和国立法法(2015年修正)》(Legislation Law of the People's Republic of China (2015 Amendment), translated by 'pkulaw.cn'), Article 80.
[878] 中国商务部:《境外投资管理办法》, 2014, Article 20. (The Chinese Ministry of Commerce, the Regulation on the Supervision of Overseas Investments, 2014.)
[879] Id, Article 32.
[880] 中国商务部:《商务部召开中国企业走出去履行社会责任专题新闻发布会》, 28-2-2013. (The Chinese Ministry of Commerce, the press release on Chinese enterprises going out, available at: http://www.mofcom.gov.cn/article/fbhfn/fbh2013/201302/20130200040491.shtml (last accessed 5-12-2016).)

6.1.4. Bad Credit Records

In 2013, the MOC enacted a regulation on bad credit records for those corporations investing abroad. According to this regulation, the following types of conduct shall be recorded as bad credit incidents of the corporation concerned: 1. A corporation does not arrange visa, health certificates, work permits and other documents that are demanded by local laws for the employees from China; 2. A corporation engages in a conflict with local people due to disrespect for local customs or religious beliefs; 3. A corporation violates local norms for the production process or technical standards and triggers accidents as a result; 4. A corporation violates local labour laws and causes disputes with local workers; 5. A corporation pollutes the local environment; 6. A corporation violates Chinese regulations on foreign exchange; 7. Other behaviour that violates local laws.[881] Most of those elements are concerned with human rights in a host State.

According to the regulation, local Commissions of Commerce are required to collect data and publish bad credit records in cooperation with other governmental organs. Local Commissions of Commerce should also submit the bad credit records they made to the MOC monthly and the latter shall publish all bad credit records on its website. In practice, however, the bad credit records system lacks transparency and efficiency. First, the author carefully checked the websites of the MOC and local Commissions of Commerce but could not find any bad credit record on those websites. Nor could the author find any bad credit record by searching the keywords such as 'bad credit record' (in Chinese: 不良信用记录), 'credit record' (in Chinese: 信用记录), 'overseas bad credit' (in Chinese: 海外不良信用) on Baidu (the biggest search engine for Chinese). It was only after the author wrote an email to the MOC to inquire into the implementation of bad credit records that the MOC

[881] 中国商务部,《对外投资合作和对外贸易领域不良信用记录试行办法》, 2013. (The Chinese Ministry of Commerce, the Provisional Regulation on the Bad Credit Records in the Field of Foreign Investments and Foreign Trades, 2013).

informed the author of the web page for the publication of bad credit records.[882] Therefore, although the bad credit records system has been already implemented, the public cannot easily get access to it. Second, on the web page provided by the MOC, there are only nine instances of bad credit records and none of them relate to human rights abuses in a host State. The bad credit records system has not recorded those revealed human rights abuses by Chinese companies or their subsidiaries.

6.2. China Banking Regulatory Commission's Measures

The China Banking Regulatory Commission (CBRC) supervises the business of all banks including State-owned banks for the purpose of financial security. The CBRC began to pay attention to corporate social responsibility as early as 2007. In 2007, the CBRC published 'Guidelines on Strengthening the Social Responsibility of Banking Financial Institutions'.[883] According to these guidelines, banks are expected to fulfill corporate social responsibility, at least including: protecting the legitimate rights and interests of shareholders and equally treating all shareholders, protecting the legitimate rights and interests of employees, consumer protection, fighting against unfair competition, commercial bribery and money-laundering activities, environmental protection, and enhancing community development.[884] The CBRC requires all banks to release information on CSR performance and it requires major banks to publish annual CSR reports on a regular basis.[885] In practice, most big banks have published their annual CSR reports and all of the four biggest State-owned banks have published their annual reports.

[882] The website is available at: http://zsmtjhzs.mofcom.gov.cn//gsapp/pages/zsmwp/gov/BadRecordListShow.html (last accessed 10-10-2016).
[883] 中国银监会:《关于加强银行业金融机构社会责任的意见》, 2007. (China Banking Regulatory Commission, Guidelines on Strengthening the Social Responsibility of Banking Financial Institutions, 2007, translated by 'pkulaw.cn').
[884] Id.
[885] Id.

In 2012, the CBRC issued a guideline to promote green credit among banks.[886] This guideline applies to both State-owned and private banks. According to Article 3 of this guideline, 'banking financial institutions shall promote green credit from a strategic perspective, increase support for green economy, low-carbon economy and circular economy, prevent environmental and social risks, enhance their environmental and social performance, as well as optimize credit structures, improve service levels and promote the transformation of the mode of development.'[887] This guideline also covers overseas credit loans. According to Article 21, 'banking financial institutions shall strengthen the environmental and social risk management of overseas projects for which credit is to be granted… Banking financial institutions shall make public commitments on adopting the relevant international practices or international standards regarding the overseas projects for which credit is to be granted, and ensure that the operation of the projects for which credit is to be granted is essentially consistent with international best practices.'[888] According to this guideline, Chinese banks should conduct a due diligence investigation before granting a loan to an overseas project. Chinese banks are urged not to grant a loan to an overseas project which would cause environmental damage. However, the consequence of non-performance in relation to this guideline is unclear.

6.3. Workplace Safety of Overseas Investments

The Chinese authorities have urged Chinese companies to improve workplace safety in official documents and meetings.[889] Several governmental organs have

[886] 中国银监会:《关于印发绿色信贷指引的通知》, 2012. (Notice of the China Banking Regulatory Commission on Issuing the Green Credit Guidelines, 2012, translated by 'pkulaw.cn'.)
[887] Id.
[888] Id.
[889] 安全监管总局:《加强境外中资企业安全生产工作座谈会召开》, 2005. 商务部、住房和城乡建设部、安全监管总局:《关于进一步加强境外投资合作项目安全生产工作的紧急通知》, 2009. (The State Administration of Work Safety, A Meeting on Improving Workplace Safety of Overseas Chinese-funded Enterprises, 2005. The Ministry of Commerce, the Ministry of Housing and Urban-Rural Development, the State Administration

coordinated to enhance the workplace safety of overseas Chinese-funded enterprises. In 2014, a notification on the workplace safety of overseas Chinese-funded enterprises was co-issued by the Ministry of Commerce, the Ministry of Foreign Affairs, the National Development and Reform Commission, the State-owned Assets Supervision and Administration Commission of the State Council, and the State Administration of Work Safety.[890] This notification (an internal legal document of governmental organs which could not formally bind a third party) recalls that strengthening the workplace safety of overseas Chinese-funded enterprises is important for the implementation of the 'going out' strategy and for China's national image.[891] This notification requires a company headquartered in China to make workplace safety rules and plans and to develop an overseas safety emergency response system for its branches or subsidiaries in a host State.[892] It also requires a Chinese company to enhance the training on safety issues at workplace for the employees of its branches or subsidiaries in a host State.[893] When an industrial accident occurs, the overseas Chinese-funded enterprise should immediately report to Chinese embassy or consulate in the host State. The Chinese embassy or consulate shall guide that company to deal with the aftermath of the accident (including mitigating the damages and negotiating compensation issues) and should report the accident to relevant governmental organs in China.[894]

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of Work Safety, An Emergent Notification of Further Enhancing the Safety of Production of Overseas Chinese-funded Enterprises, 2009.)

[890] 《商务部、安全监管总局、外交部、发展改革委、国资委关于进一步加强境外中资企业安全生产监督管理工作的通知》（商合函〔2014〕226 号）, 2014. (The Ministry of Commerce, the State Administration of Work Safety, the Ministry of Foreign Affairs, the National Development and Reform Commission, the State-owned Assets Supervision and Administration Commission of the State Council, the Notification of Enhancing the Safety of Production of Overseas Chinese-funded Enterprises, 2014.)

[891] Id.

[892] Id.

[893] Id.

[894] Id.

In fact, four governmental organs co-exposed a serious industrial accident caused by a Chinese-funded enterprise in Ethiopia to the public as early as 2010.[895] That accident caused five deaths, including four Chinese citizens. Those four governmental organs realized the importance of workplace safety in overseas investments and promised to punish the persons who were responsible for the accident in accordance with law.[896] However, there is a legal gap for holding a person accountable for an accident that has occurred in an overseas investment. China's Work Safety Law does not have an extraterritorial dimension. According to Article 2 of this law, it is only applicable to the workplace safety of entities engaged in production and other business activities within the territory of the People's Republic of China.[897] However, the State council has planned to explore the possibility of holding a person accountable for accidents occurring in overseas investments.[898]

7. Special Measures for State-owned Corporations

In China, the shareholder of a State-owned corporation could be the central government or a local government. Accordingly, the State-owned Assets Supervision and Administration Commission of the State Council (the SASAC) exercises the right of a shareholder on behalf of the central government. The State-owned Assets Supervision and Administration Commission of a local government exercises the right of a shareholder on behalf of the local government. In addition to exercising the right of a shareholder on behalf of the central government, the SASAC is also in charge of guiding and supervising the work of the State-owned

[895] 商务部、安全监管总局、外交部、国资委:《关于近期境外中资企业生产安全事故的通报》, 2010.(The Ministry of Commerce, the State Administration of Work Safety, the Ministry of Foreign Affairs, the State-owned Assets Supervision and Administration Commission of the State Council, Media Briefing on Industrial Accidents Caused by Chinese-funded Enterprises Abroad, 2010.)
[896] Id.
[897] 《中华人民共和国安全生产法(2014 修正)》(Work Safety Law of the People's Republic of China (2014 Amendment).)
[898] 国务院:《安全生产十三五规划》, 2017. (The State Council, Safety of Production in the Thirteenth National Plan, 2017.)

Assets Supervision and Administration Commissions of local governments. State-owned banks and other financial companies are State-owned corporations, in essence, but their shareholders are the Ministry of Finance or the financial department of a local government. These State-owned banks and other financial companies are supervised by State financial organs (such as the Ministry of Finance and China Banking Regulatory Commission) rather than the State-owned Assets Supervision and Administration Commissions.

7.1. Corporate Social Responsibility Performance by the State-owned Corporations Directly Owned by the Central Government

In 2008, the SASAC promulgated the 'Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities'.[899] The guidelines require the State-owned corporations owned by the central government to fulfill corporate social responsibilities (CSR) and to establish an information releasing mechanism in order to provide updated and regular information about their CSR performance.[900] The substantial contents of CSR mentioned by the SASAC include: improving product quality and service; strengthening resource conservation and environmental protection; ensuring production safety; protecting legal rights of employees; and participating in social pubic welfare programs.[901] The SASAC has also established an internal office in charge of CSR affairs.[902] The positive aspect of the guidelines is that the SASAC has realized the importance of CSR and it purports to be willing to promote CSR among State-owned corporations of the central government.

[899] The SASAC, the Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities, 2008.
[900] Id, Article 5 and Article 18.
[901] Id, Article 10-- Article 15.
[902] 国有资产监督管理委员会,《关于成立国资委中央企业社会责任指导委员会的通知》, 2012. (The SASAC, the Notification of Establishing the Guiding Commission on the Corporate Social Responsibilities of the State-owned Corporations Directly under the Central Government, 2012).

In practice, almost every State-owned corporation of the central government has released its CSR reports. Some corporations have even published reports in both Chinese and English. A few corporations have not published their CSR reports but they at least released the news on their websites on how they had fulfilled CSR. Almost all the corporations that have overseas investments have included their overseas acts in their CSR reports. However, most corporations only emphasized the contribution they made to the local community and they seldom mentioned the negative impacts on human rights of their business in host States.

In 2015, for example, the China Railway Construction Corporation Limited published its CSR report for 2014.[903] In this report, it emphasized that the corporation has been engaged in promoting the following issues in one or two sentences: reinforcing internal control and corporate governance, insisting on anti-corruption policy, paying tax in accordance with law, promoting technological innovation, improving working safety, focusing on employees' development, training and occupational health, prohibiting child labor and forced labor, respecting local customs and religions in a host State, employing local employees in strict compliance with local labor regulations, paying overwork salary for extra working hours in accordance with local regulations, enhancing communication and cooperation with local communities and doing charity work in host States.[904] In this report, negative aspects of CSR have not been reported, such as whether there was a strike or protest in a host State. In 2015, the China National Petroleum Corporation also published its CSR report for 2014.[905] In this report, we can only see the positive aspects of CSR. For example, its African branches provided medicine to local employees.[906] In another instance, it donated 1.6 million US dollars to build a shelter for refugees of South Sudan conflicts in cooperation with the United

[903] China Railway Construction Corporation Limited, Social Responsibility Report 2014.
[904] Id.
[905] 中国石油天然气集团公司:《2014 企业社会责任报告》. (China National Petroleum Corporation, Corporate Social Responsibility Report 2014).
[906] Id, p.40.

Nations.[907] However, nothing negative was reported in that CSR report. It is not clear whether the SASAC has taken follow-up measures towards those CSR reports.

The SASAC does not undertake a close scrutiny of the CSR reports released by State-owned corporations of the central government. Nor does it undertake follow-up measures. It is doubtful whether the CSR reporting mechanism can really reveal corporate human rights abuses abroad. The NGO Human Rights Watch has revealed human rights abuses in Zambia by subsidiaries of the China Nonferrous Metal Mining (Group) Co., Ltd. (CNMC, a State-owned corporation of the Chinese central government) in 2011.[908] It was revealed by Human Rights Watch that workers were working in unsafe conditions and were required to work overtime.[909] In 2012, the CNMC released its CSR report for investments in Zambia. This report did not mention unsafe working conditions or any other negative aspects, nor did it respond to the critiques of Human Rights Watch.[910] What is more, the CNMC has even been awarded a prize by the Chinese government for its so-called good practice in CSR performance in 2011.[911] Therefore, the CSR reports of State-owned corporations have not fully exposed their negative impacts on human rights in a host State.

7.2. Corporate Social Responsibility Performance by the State-owned Corporations of Local Governments

State-owned corporations of a local government are supervised by the State-owned Assets Supervision and Administration Commission of a local government. Some

[907] Id, p.49.
[908] Human Rights Watch, 'Zambia: Workers Detail Abuse in Chinese-Owned Mines' (3 November 2011), available at: https://www.hrw.org/news/2011/11/03/zambia-workers-detail-abuse-chinese-owned-mines (last accessed 20-9-2015).
[909] Id.
[910] The China Nonferrous Metal Mining (Group) Co., Ltd., 2011 Social Responsibility Report for Investments in Zambia, available at: http://www.cnmc.com.cn/upload/attachment/Zambia2011SocialResponsibilityReport.pdf (last accessed 17-10-2016).
[911] The news report is available at: http://www.cnmc.com.cn/detail.jsp?article_millseconds=1322039424709&column_no=0101 (last accessed 17-10-2016).

local governments are also encouraging the State-owned corporations they supervise to invest more abroad and to become multinational corporations.[912] Coordinated and guided by the SASAC, almost all local State-owned Assets Supervision and Administration Commissions have required or encouraged the State-owned corporations they supervise to fulfill CSR, including when companies invest abroad.[913] However, the problem is the same with the SASAC's measures: State-owned Assets Supervision and Administration Commissions have not looked into the performance of CSR by State-owned corporations seriously. State-owned Assets Supervision and Administration Commissions are always satisfied with the CSR reports released by State-owned corporations.

7.3. State-owned Financial Companies

The shareholders of State-owned financial companies such as State-owned banks are the Ministry of Finance or Commissions of Finance of a local government rather than State-owned Assets Supervision and Administration Commissions. The SASAC is not in charge of supervising State-owned financial companies. We could not find that the Ministry of Finance so far has adopted any special measure to ensure State-owned financial companies respect human rights including when they invest abroad. However, the business of State-owned banks (together with ordinary commercial banks) is supervised by the China Banking Regulatory Commission (CBRC) for the purpose of financial security. The regulations of the CBRC usually apply to all commercial banks, both private and State-owned. Most State-owned banks have released corporate social responsibility report in accordance with the requirement of the CBRC.[914]

[912] For example, 上海市政府:《关于进一步加快培育上海国有跨国公司的实施意见》. (The government of Shanghai, the guidelines concerning boosting Shanghai State-owned corporations to become multinational corporations.)
[913] 国有资产监督管理委员会:《国务院国资委 2015 年度指导监督地方国资工作计划》, 2015. (The SASAC, the Work Plan of the SASAC on How to Monitor and Guide the State-owned Assets Supervision and Administration Commissions of Local Governments, 2015.)
[914] China Construction Bank, the Corporate Social Responsibility Report, 2015, available at: http://file.finance.sina.com.cn/211.154.219.97:9494/MRGG/CNSESH_STOCK/2016/2016-

Since 2007, the Industrial and Commercial Bank of China (ICBC, one of the four biggest State-owned banks) has published nine annual CSR reports. In its report for 2015, for example, the ICBC examined its CSR performance by reference to the Ten Principles of the UN Global Compact (UNGC).[915] The ICBC has mentioned the term 'human rights' in its report. As for the first principle of the UNGC, the ICBC has stated that: 'The Bank valued people, strictly observed laws, regulations and ordinances of China and other countries where it operated, entered into employment contracts with all of its employees, fully paid employer's social security and housing provident fund contributions for its employees, improved the system of employee involvement in corporate management and effectively protected the rights and interests of employees.'[916]As for the second principle of the UNGC, the ICBC has stated that: 'The Bank abided by international conventions or practices signed or recognized by China, including the Universal Declaration of Human Rights.'[917] The ICBC also reported that it strictly prohibited child labor.[918] As for the eighth principle of the UNGC, the ICBC has reported that: 'The Bank improved its green credit policies and procedures, established an accountability mechanism for green credit and strengthened credit risk management of enterprises with outdated production capacity and heavy metal pollution. The Bank implemented the 'one-ballot veto' rule for lending to root out the causes of environmental pollution and fully supported the eco-friendliness drive.'[919]

The China Construction Bank and the Agricultural Bank of China (two of the four biggest State-owned banks) have also explicitly mentioned the keyword 'human rights' in their reports. They have written their reports by adopting the Sustainability Reporting Guidelines (G4 Guidelines) of the Global Reporting

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3/2016-03-31/2301062.PDF (last accessed 21-10-2016). Bank of China, the Corporate Social Responsibility Report, 2014, available at: http://pic.bankofchina.com/bocappd/report/201504/P020150422580527578855.pdf (last accessed 21-10-2016).

[915] Industrial and Commercial Bank of China, ICBC Corporate Social Responsibility Report 2015, p.93.

[916] Id.

[917] Id.

[918] Id.

[919] Id.

Initiative.[920] Among all the indicators concerning human rights under the G4 Guidelines, the Agricultural Bank of China has adopted 'G4-HR2' (Total hours of employee training on human rights policies or procedures concerning aspects of human rights that are relevant to operations, including the percentage of employees trained).[921] The China Construction Bank adopted 'G4-HR10' and 'G4-HR11'.[922] Among the four biggest State-owned banks, only the Bank of China has not mentioned the keyword 'human rights', nor has it made reference to G4 Guidelines.[923] But the Bank of China has at least mentioned environmental (for example its green credit policies) and employment issues.[924]

In addition to State-owned banks, the China Export and Credit Insurance Corporation (中国出口信用保险公司) deserves special attention. One of the functions of this company is underwriting overseas investment insurance (usually for political risks) to Chinese corporations investing abroad. This is a State-owned corporation itself, the biggest shareholder of which is the Ministry of Finance. According to the conclusion of Chapter 2, the conduct of this corporation should be attributed to China. Furthermore, underwriting overseas investment insurance is usually considered an exercise of governmental authority which is another legal basis for attribution. Once the attribution is established, the contribution to human rights abuses by this company means the contribution to human rights abuses by China. In reality, this company has also released its CSR report,[925] but the CSR report it released has not exposed any problem it has on human rights. Presently, the China Export and Credit Insurance Corporation does not require corporations applying for overseas investment insurance to undertake a human rights impact assessment. As China has an extraterritorial obligation to respect human rights, the China Export

[920] China Construction Bank, the Corporate Social Responsibility Report 2015, p.90. Agricultural Bank of China, the Corporate Social Responsibility Report 2015, p.97.
[921] Agricultural Bank of China, the Corporate Social Responsibility Report 2015, p.105.
[922] China Construction Bank, the Corporate Social Responsibility Report 2015, p.65.
[923] Bank of China, the Corporate Social Responsibility Report 2015.
[924] Id, p.9.
[925] China Export and Credit Insurance Corporation, the Corporate Social Responsibility Report, 2013.

and Credit Insurance Corporation should not approve overseas investment insurance for those companies that could potentially abuse human rights abroad.

7.4. A Case Study: Copper Mining Company in Zambia

China's human rights practice has been a concern of the world. If we search the key words 'China' and 'human rights' on google (www.google.com), we can find tens of thousands of negative news report and criticism. However, when we search the key words 'China' (or 'Chinese'), 'State-owned corporation' (or 'State-owned enterprise' or 'State-owned company') and 'human rights abuse' (or 'human rights violation') on google, almost all the negative news report and criticism are directed against poor conditions of workers' safety and curtailment of union activity in China's State-owned mining companies in Zambia.[926] These companies are subsidiaries of the China Nonferrous Metal Mining (Group) Co., Ltd, a wholly State-owned enterprise (国有独资企业).

In 2011, Human Rights Watch criticized the human rights abuses of those companies in Zambia, mainly including poor health and safety conditions and the curtailment of union activity.[927] Human Rights Watch's criticism was reported by the Chinese media and the Chinese Ministry of Foreign Affairs denied that there was a violation of labor rights by the subsidiaries of the China Nonferrous Metal Mining Company.[928] This book has argued that the extraterritorial obligation to respect human rights will immediately impose the burden of investigation on the home State which denies a certain abuse of human rights based on preliminary evidence.[929] China has not pronounced an investigation into that situation. It is arguable that China has at least breached its obligation of investigation in this case.

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[926] Human Rights Watch, Zambia: Workers Detail Abuse in Chinese-Owned Mines, 3-11-2011.
[927] Id.
[928] 新浪网:《中方否认在赞比亚侵害劳工权》, 4-11-2011. (Sina news, Chinese authority denied a violation of labor rights in Zambia, 4-11-2011.)
[929] Chapter 4, at 6.

Human Rights Watch's criticism may have aroused the attention of the Chinese government. After Human Rights Watch's criticism, a high-level Chinese official, Huashan Sun (a deputy director of the State Administration of Work Safety), visited those companies in Zambia to inspect and guide workplace safety issues.[930] During his visit, Sun asked those companies to increase resources and to adopt a high standard for workplace safety management in order to improve China's national image.[931] The news report did not mention whether his visit was related to Human Rights Watch's criticism.[932] However, the working conditions and workplace safety were improved after his visit, which can be found in the follow-up research carried out by Human Rights Watch.[933] Therefore, China cares about its international fame and it is at least willing to make up for the exposed scandal in the field of business and human rights.

This case also indicates that there is no problem of media freedom on business and human rights issues in China even when State-owned corporations are involved. Human Rights Watch's criticism was reported in detail by the Chinese media.[934] In fact, the China Nonferrous Metal Mining Company is also willing to respond to their critics. Since 2005, the Business & Human Rights Resource Centre has invited companies to respond to allegations of corporate misconduct raised by civil society.[935] The China Nonferrous Metal Mining Company's response rate is 100%

[930] 安全监管总局:《孙华山率队在赞比亚调研考察中资企业安全生产工作中强调:坚持安全发展,促进互利共赢》, 28-6-2012, available at: http://www.chinasafety.gov.cn/newpage/Contents/Channel_20132/2012/0628/172735/content_172735.htm (last accessed 12-12-2016). (The State Administration of Work Safety, Huashan Sun visited Chinese mining companies in Zambia and emphasized that development should be based on safety and that a win-win outcome should be promoted, 28-6-2012.)
[931] Id.
[932] Id.
[933] Human Rights Watch, Zambia: Safety Gaps Threaten Copper Miners: Government, Chinese State-Owned Subsidiaries Make Uneven Progress, 20-2-2013.
[934] 新浪网:《中方否认在赞比亚侵害劳工权》, 4-11-2011. (Sina news, Chinese authority denied a violation of labor rights in Zambia, 4-11-2011.)
[935] Menno T. Kamminga, *Company Responses to Human Rights Reports: An Empirical Analysis*, 1 BUSINESS AND HUMAN RIGHTS JOURNAL 95(2015). p.96.

(until 1 February 2017).[936] Although the Chinese Ministry of Foreign Affairs may not be willing to admit to the existence of human rights abuse by Chinese State-owned corporations in its official statement, the Chinese authority is actually willing to order State-owned corporations to improve working conditions in their overseas investments at least when poor conditions are exposed to the public.

8. Conclusion

China has motivated Chinese companies, both private and State-owned, to invest abroad under the 'One Belt, One Road' project.[937] China's reputation in human rights performance is frequently negative and its human rights practice has for a long time been subject to strong criticism from the West.[938] However, China tells a different story in the discourse of business and human rights. This chapter shows that China is at least as willing as western countries to regulate its overseas investments.[939] China has committed itself to regulating Chinese companies for their overseas human rights impacts in its national human rights action plan.[940] It has also been actively engaged in the dialogue with human rights treaty bodies on home State regulations.

As a home State, China has taken some measures to regulate Chinese overseas investments, such as the MOC's regulations and guiding principles for ordinary companies and the CSR reporting requirement for State-owned corporations.[941] The MOC has even required Chinese companies to obey international treaties to which China is a party when they conduct overseas investments.[942] The Chinese

[936] See the website of Business & Human Rights Resource Centre, available at: https://www.business-humanrights.org/en/china-nonferrous-metal-mining (last accessed 1-2-2017).
[937] The above section2.2.
[938] Human Rights Watch, World Report 2016: China. Camila Ruz, Human Rights: What is China accused of?, BBC News Magazine, 21 October 2015. US, 2016 Country Reports on Human Rights Practices: China, 3 March 2017.
[939] The above section 6 and 7.
[940] The above section 3.
[941] The above section 6 and 7.
[942] Supra note 874.

government has also strengthened the inspection of its State-owned corporations after human rights NGO's criticism. This indicates that China is at least willing to make up for the exposed scandal in the field of business and human rights.[943] Some positive measures taken by the Chinese government, such as 'green credit' and 'bad credit records', were not reported by the Chinese delegation to the treaty bodies and therefore these measures have not been fully exposed.[944] In general, the Chinese authorities are willing to regulate Chinese overseas investments out of consideration for the national image and international fame.

Although China's regulatory measures as a home State are still expanding, China has adopted a very low degree of diligence for home State regulations. For example, some measures such as CSR reporting regimes are quite weak and it is doubtful whether they could effectively deter overseas human rights damage. In addition, China is also reluctant to publicly investigate the situation when it denies a violation of human rights committed by its State-owned corporations abroad.[945] In this regard, China has breached its obligation of investigation derived from the extraterritorial obligation to respect human rights.[946] A research shows that China does not and will not oppose the UN human rights agenda, but China sometimes places emphasis on its status as a developing country or its national realities to argue for a lesser degree of obligations.[947] This chapter has argued that the self-definition as a developing country should not be used as an excuse to shirk obligations to regulate business for extraterritorial impacts on human rights.[948] Furthermore, China's national realities could not support a lesser degree of obligations because China is boosting and protecting overseas investments under the 'One Belt, One Road' project.

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[943] The above section 7.4.
[944] Committee on Economic, Social and Cultural Rights, Replies of China to the List of Issues, 11 February 2014, E/C.12/CHN/Q/2/Add.1, paras.3-6.
[945] The above section 7.4.
[946] Chapter 4, at 6.
[947] Surya P. Subedi, *The Universality of Human Rights and the UN Human Rights Agenda: The Impact of the Shift of Power to the East and the Resurgence of the Brics*, 55 INDIAN JOURNAL OF INTERNATIONAL LAW 177(2015).p.203.
[948] The above section 2.3.

China should make its domestic law compatible with its international obligations under human rights treaties. China has not adopted the principle of *forum necessitates* in its civil procedure law so far. But Chinese scholars have proposed such a principle.[949] Chinese tort law theory could support a parent company's duty of care.[950] In this background, China could fulfil its obligations to provide a remedy as a home State either by hearing a civil litigation against a subsidiary registered in a host State, or by endorsing a parent company's duty of care. If China denies both of them, China may breach its obligations to provide a remedy as a home State.

In fact, many powerful home States have their own problems in the field of business and human rights,[951] and therefore China and western countries face the same challenge in this field. China should be more confident in conducting a dialogue and sharing experience and lessons with other home States. China has paid great attention to the interplay with human rights treaty bodies.[952] Treaty bodies could continue to urge China to enhance the enforcement of the existing regulatory measures and to adopt a higher degree of diligence for home State regulations.

[949] Supra note 827.
[950] Supra note 865.
[951] Supra note 766.
[952] Supra note 815. See also the statement of the Chinese delegation before the CESCR in 2014, available at: http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/CHN/INT_CESCR_STA_CHN_17180_E.pdf (last accessed 12-11-2016).

Chapter 7 Conclusion

Public international law is traditionally considered to be based on a private law paradigm, which is understood in analogy to contracts and property.[953] The present day conditions of international relations are increasingly calling for the notion of international public law, which excludes the strictly horizontal phenomena of public international law that do not claim to pursue common interests.[954] International human rights treaties, created after the Second World War, have reflected the basic value of human dignity and have addressed vertical relationships. Although human rights treaties proclaim common interests (for example 'the equal and inalienable rights of all members of the human family' in the preamble of the ICCPR), they do not seriously negate a differential treatment based on the location in which an individual finds himself/herself.[955] This book explores how far the existing human rights treaties could support the idea of the global observance by a State party of human rights in the context of business and human rights.

MNCs could have negative effects on human rights in a host State. What can we expect from a home State in regard to this phenomenon? Christine Chinkin has argued that a State should be responsible for all wrongful acts emanating from it or from nationals subject to its jurisdiction.[956] However, the UNGPs have denied home State obligations in general.[957] This book undertakes to interpret the existing human rights treaties in light of present day conditions. The problem caused by private abusers could be addressed either by attributing more to States under secondary

[953] HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW : WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION (Lawbook Exchange. 2002). pp.1-5.
[954] Armin von Bogdandy, et al., *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, 28 EUROPEAN JOURNAL OF INTERNATIONAL LAW 115(2017).p.132.
[955] SIGRUN SKOGLY, BEYOND NATIONAL BORDERS: STATES' HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION (Intersentia. 2006).p.1.
[956] Supra note 157.
[957] United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, HR/PUB/11/04.

rules or by developing positive obligations in primary rules.[958] This book acknowledges that primary rules and secondary rules are interrelated in relation to human rights violations. It addresses the problem of the human rights damage caused by a State-owned corporation by developing secondary rules on attribution issues, because a State-owned corporation has a close link to the State as owner. The problem of the human rights damage caused by an ordinary company will be tackled by exploring the scope of positive obligations under human rights treaties (primary rules).

Based on the analysis in above chapters, the author is able to answer the research questions of this book. In the discourse of business and human rights, previous research and the practice of human rights treaty bodies have not paid much attention to State-owned corporations. This group of corporations is special because of their nexus with the State which owns them. **Can the conduct of a State-owned corporation be attributed to the State as owner?** The ILC Articles have provided a legal framework for the attribution issues. However, these articles have not settled the attribution issue concerning State-owned corporations. The Nicaragua, Tadić or Genocide criterion could not solve this problem either, because they have overlooked situations where a State has the ability to control an entity.[959] The WTO case law has indicated that it is difficult for a third party to prove the real relationship between a State-owned corporation and the State.[960] The ECtHR has adopted a flexible approach to the attribution issue: on one hand, it is inclined to presume the attribution of the conduct of a State-owned corporation to the State; on the other hand, it leaves space for States to overthrow that presumption.[961] The flexible approach to the attribution issue relies on the judicial discretion of the ECtHR. This approach may not be appropriate in the context of the core UN human rights treaties, the judicial enforcement of which is not as strong as the ECHR.

[958] Supra note 162.
[959] Chapter 2, at 4.3.4.
[960] Chapter 2, at 5.2.
[961] Chapter 2, at 5.1.

A special rule for attribution is needed in the discourse of universal human rights treaties. The special rule can be designed as follows: 'The conduct of a State-owned corporation should be directly attributed to the State which has the majority ownership in the corporation.' [962] China's practice concerning State-owned corporations has further highlighted the need for the special rule on the attribution issue. **Does a home State have special obligations for its State-owned corporations that carry out overseas investments?** Once the direct attribution can be proven, the extraterritorial application of human rights treaty encounters no obstacle according to the existing case law of the ECtHR and the ICJ.[963] The obligation at stake for State-owned corporations is the obligation to respect, as compared to the obligation to protect for ordinary companies.

Home State obligations for ordinary companies concern the scope of positive obligations under human rights treaties. This book has adopted a unified approach to address the scope of State obligations in regards to all human rights treaties regardless of whether the treaty contains a jurisdiction clause. **What is the function of the expression 'individuals within the jurisdiction of a State' in human rights treaties? Are home State obligations possible if individuals located in a host State are not within its jurisdiction?** If a person falls within the jurisdiction of a State,[964] then this person has an entitlement to positive obligations from this State. Alternatively, if a perpetrator who abuses or may abuse human rights falls within the jurisdiction of a State, then the State should also punish this person or prevent this person from abusing human rights. Therefore, home State obligations are possible when a company (a perpetrator) is within its jurisdiction, even if the individual victim is not considered to be within the jurisdiction of the home State.

The Maastricht Principles (scholarly opinions) have developed the notion of extraterritorial obligations in the area of economic, social and cultural rights. The Maastricht Principles have stated that a State has extraterritorial obligations to

[962] Chapter 2, at 5.3.
[963] Chapter 3, at 3.3, Chapter 4, at 3.2.
[964] The ICCPR is an exception due to the term of territory in this treaty. See Chapter 3, at 4.1.

respect, to protect and to fulfill human rights.[965] As regards business, the Maastricht Principles require a State to regulate business where the corporation, or its parent or controlling company, has its center of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned.[966] The Maastricht principles are supportive of home State obligations over MNCs in general. However, they have not articulated whether individuals (potential victims of a corporate abuse) located in a host State are within the jurisdiction of a home State.

This book aims to interpret the term 'jurisdiction' (over individual victim) in human rights treaties. Is it possible that individuals located in a host State are within the jurisdiction of a home State for the purpose of invoking a human right? This book has argued that due regard should be given to international investment law in the course of the interpretation of jurisdiction in human rights law in order to mitigate the fragmentation of international law.[967] This is also the most frequently used approach to maintaining the systemic integration of international law.[968] In recent decades, international investment law has been prosperous. A home State tends to conclude a BIT or other international investment agreement with a host State to protect investments made by the nationals of the home State. Many BITs have placed restrictions on the regulatory space of a host State.[969] It is submitted that individuals in a host State can fall within the jurisdiction of a home State to the extent that the home State has limited the regulatory power of the host State through international investment law practice.[970] This interpretation of jurisdiction is specially applied to the obligation to protect, and it does not deal with the obligation to fulfill. This approach to jurisdiction over

[965] Supra note 58.
[966] Id, para.25.
[967] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 18 July 2006, A/CN.4/L.702, p.13.
[968] Supra note 125.
[969] Supra note 551, 552.
[970] Chapter 4, at 4.2.

individual victim in a host State could build a bridge between human rights law and investment law.

The due diligence obligation approach is appropriate for all human rights treaties, with or without a jurisdiction clause. In the discourse of business and human rights, an MNC is headquartered in the territory of a home State and therefore within its jurisdiction. Human rights treaties should be interpreted as requiring States to control activities within their own territory in order not to cause damages to human rights in other countries. This interpretation has been endorsed by human rights treaty bodies.[971] A home State should prevent or deter a parent company in its territory from damaging (including through the conduct of its subsidiaries) human rights abroad. A minimum standard of due diligence measures may be induced from State practice. The minimum standard for a home State is mainly procedural obligations in nature: for example to require an MNC headquartered therein to release information on their impacts on human rights extraterritorially, or to adjudicate the civil litigation filed by victims in good faith and with due regard to human rights.[972]

Above all, the UNGPs have not properly interpreted the scope of State obligations under human rights treaties, which caused a denial of home State obligations.[973] On 26 June 2014, the UN Human Rights Council adopted a resolution calling for the establishment of an open-ended intergovernmental working group 'to elaborate an international legally-binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[974] It is submitted that drafting a new treaty is a good opportunity to set up a clear expectation for a home State to fulfill its obligations. Furthermore, human rights treaty bodies should continue to monitor home State obligations.

[971] Chapter 5.
[972] Supra note 594. Supra note 608.
[973] United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, HR/PUB/11/04.
[974] The UN Human Rights Council, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, A/HRC/RES/26/9, 14 July 2014, para.1.

The quality of the output of treaty bodies could be further improved. Although some treaty bodies have mentioned State-owned corporations in their general comments or concluding observations, they have not elaborated on the attribution issue concerning those corporations. Indeed, such an issue may entail different types of obligations for a home State and therefore treaty bodies should pay attention to this issue in the future. Different treaty bodies' interpretations on home State obligations are slightly different in their content. However, this is not a big problem and the harmonization of different treaty bodies' interpretations can be realized through the meetings of treaty body chairpersons and inter-committee meetings.

Is China willing to regulate Chinese overseas investments? How has China regulated human rights abuses committed by Chinese companies abroad? As a powerful economy, China has motivated Chinese companies, both private and State-owned, to invest abroad under the 'One Belt, One Road' project. China's reputation in human rights performance is frequently negative and its human rights practice has for a long time been subject to strong criticism from the West.[975] However, China tells a different story in the discourse of business and human rights. China has committed itself to regulating Chinese companies for their overseas human rights impacts in its national human rights action plan.[976] It has also been actively engaged in the dialogue with human rights treaty bodies on home State regulations.

Although China's regulatory measures as a home State are still expanding, China has adopted a very low degree of diligence for home State regulations. For example, some measures such as CSR reporting regimes are quite weak and it is doubtful whether they could effectively deter overseas human rights damage. In addition, China is also reluctant to publicly investigate the situation when it denies a

[975] Human Rights Watch, World Report 2016: China. Camila Ruz, Human Rights: What is China accused of?, BBC News Magazine, 21 October 2015. US, 2016 Country Reports on Human Rights Practices: China, 3 March 2017.
[976] Supra note 820.

violation of human rights committed by its State-owned corporations abroad.[977] In this regard, China has breached its obligation of investigation derived from the extraterritorial obligation to respect human rights.[978] In fact, China and western countries face the same challenge as home States in the field of business and human rights. Human rights treaty bodies have also exposed the deficiency of regulatory measures taken by western countries as home States.[979] China should be more confident in conducting a dialogue and sharing experience and lessons with other home States.

This book has clarified the legal basis for home State obligations. It is now clear that both host State and home State have obligations under human rights treaties to regulate MNCs. Deep international cooperation is needed in today's highly interdependent world.[980] International cooperation is also a cornerstone in human rights law, especially in the field of economic, social and cultural rights. Host State and home State should cooperate to protect human rights against abuses by business.

[977] Chatper 6, at 7.4.
[978] Chapter 4, at 6.
[979] Supra note 766.
[980] Supra note 536.

Summary

The global operation of MNCs could have negative effects on human rights in a host State. What can we expect from a home State with regard to this phenomenon? What obligations does a home State have under human rights treaties? The problem caused by private abusers could be addressed either by attributing more to States under secondary rules or by developing positive obligations under primary rules. This book addresses the problem of the human rights damage caused by a State-owned corporation by developing secondary rules on attribution issues, because a State-owned corporation has a close link to the State as an owner. The problem of the human rights damage caused by an ordinary company is tackled by exploring the scope of positive obligations under human rights treaties (primary rules).

The ILC Articles have provided a legal framework for the attribution issues in general. However, these articles have not settled the attribution issue in relation to State-owned corporations. A special rule for attribution is needed in the discourse about universal human rights treaties. The special rule can be designed as follows: 'The conduct of a State-owned corporation should be directly attributed to the State which has the majority ownership in the corporation.' Once the direct attribution can be proven, the extraterritorial application of human rights treaty does not face any obstacles according to the existing case law.

Home State obligations for ordinary companies concern the scope of positive obligations under human rights treaties. This book adopts a unified approach to address the scope of State obligations with regard to all human rights treaties regardless of whether the treaty contains a jurisdiction clause or not. This book has clarified the function of the expression 'individuals within the jurisdiction of a State' in human rights treaties. If a person falls within the jurisdiction of a State, then this person is entitled to positive obligations from this State. Alternatively, if a perpetrator who abuses or may abuse human rights falls within the jurisdiction of a

State, then the State should also punish this person or prevent this person from abusing human rights.

In the discourse of business and human rights, an MNC is headquartered in the territory of a home State and therefore within its jurisdiction. Human rights treaties should be interpreted as requiring States to control activities within their own territory in order to not infringe human rights in other countries. This interpretation has been endorsed by human rights treaty bodies. Therefore, home State obligations are possible when a company (a perpetrator) is within its jurisdiction, even if the individual victim is not considered to be within the jurisdiction of the home State.

This book also explored the possibility that individuals located in a host State are within the jurisdiction of a home State for the purpose of invoking a human right. It has argued that due regard should be given to international investment law in the course of the interpretation of jurisdiction in human rights law in order to mitigate the fragmentation of international law. It is submitted that individuals in a host State can be considered to fall within the jurisdiction of a home State to the extent that the home State has limited the regulatory power of the host State through international investment law practice. This interpretation of jurisdiction is specially applied to the obligation to protect and it does not deal with the obligation to fulfill. This approach to the jurisdiction over an individual victim in a host State could build a bridge between human rights law and investment law.

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Valorisation Addendum

A. Social Relevance

This book has explored home State obligations in relation to MNCs under human rights treaties. Its social relevance is illustrated by the following three points.

First, the topic of this book concerns a social movement calling for more moral business practices. In the era of economic globalization, the global operation of MNCs could have significantly negative impacts on the enjoyment of human rights in a host State. Some human rights NGOs have devoted themselves to reveal cases of corporate human rights abuses. Some NGOs have openly proposed to build an international framework to promote human rights in business sector. A few NGOs have urged home States of MNCs to regulate business beyond borders. However, NGOs have not clarified the legal basis for home State obligations. This book has shed light on the legal basis for home State obligations by interpreting human rights treaties.

Second, the international community has also paid a lot of attention to the issue of business and human rights. However, the UN Guiding Principles on Business and Human Rights (UNGPs) have generally denied home State obligations over MNCs. This book has argued that the UNGPs have not properly interpreted the existing human rights treaties. Human rights treaty bodies have endorsed the home State's due diligence obligations. My research results strengthen the legal basis for home State obligations. My research results may also promote the inclusion of home State obligations in the ongoing process of drafting a legally binding treaty on business and human rights.

Third, this book has depicted China's practice in regard to home State regulation. China's economic rise makes more and more people interested in the extraterritorial human rights impacts by Chinese overseas investments. China's human rights record has been rebuked for a long time. In the discourse of business and human

rights, however, China is willing to regulate its overseas investments. My research helps the world know China's measures over corporate human rights abuses abroad. This book has revealed the deficiency of China's regulation. It also illustrates that some positive measures taken by the Chinese government have not been fully reported to the treaty bodies. The findings of this book could help the Chinese government to prepare better for reporting procedures before treaty bodies with regard to business and human rights issues.

B. Target groups

My research results are of interest to human rights treaty bodies. Human rights treaty bodies have been active in promoting home State obligations. As is discussed in Chapter 5, however, human rights treaty bodies have not interpreted 'jurisdiction' over individual victims. Nor have they paid sufficient attention to home State obligations over State-owned corporations. The results of this book could help those treaty bodies to monitor home State obligations better because the current research has filled in the above gaps. This book, together with other articles published by the author in Chinese journals, may call Chinese readers' attention to China's human rights obligations as a home State to regulate business. The results of this book are also of interest to the Chinese authorities, because the author has made suggestions for them to improve their regulatory measures. The Chinese government can also use the information provided in this book to draft periodic State reports to a treaty body.

C. Activities/Products

This thesis has provided evidence for the legal basis for home State obligations under human rights treaties. We can anticipate that many home States will be under pressure to change their domestic law to facilitate legal remedies for victims from host States in order to fulfill their obligations as a home State. As a consequence, transnational litigation against MNCs will probably boom before domestic courts of a home State. My research results may also be translated into a closer scrutiny by

human rights treaty bodies in regard to home State obligations. Treaty bodies may pay special attention to home State obligations over State-owned corporations in the future.

D. Innovation

Previous research/practice on business and human rights has not paid adequate attention to State-owned corporations, whose conduct may be directly attributed to a home State. This thesis addresses the problem of the human rights abuse committed by a State-owned corporation by developing secondary rules on attribution issues. It has argued that the conduct of a State-owned corporation should be directly attributed to the State which has the majority ownership in the corporation in the context of human rights protection. Once the direct attribution can be proven, the extraterritorial application of human rights treaty encounters no obstacle according to the existing case law. Therefore, home State obligations over State-owned corporations deserve more attention in human rights practice.

Another innovation of this thesis is that it interprets the term 'jurisdiction' in human rights law in light of international investment law. It has argued that individuals in a host State can fall within the jurisdiction of a home State to the extent that the home State has limited the regulatory power of the host State through international investment law practice. This interpretation could strengthen home State obligations over ordinary companies while maintaining the systemic integration of international law.

E. Plans and Implementation

I plan to publish my thesis as a book to facilitate the dissemination of my research findings. I will give my book free of charge to some NGOs that are active in the field of business and human rights. I have already published two articles on the current topic in Chinese journals. I want to publish two more articles in Chinese journals, based on my previous research, to advocate the notion of home State

obligations in China. I will make a proposal for empirical research on home State obligations in the future and try to apply for the Chinese government sponsored research funding, the research outcome for which may raise the attention of the Chinese authority. I will design a course on business and human rights for bachelor students in my new institute in China. I also plan to participate in the UN Forum on Business and Human Rights, and submit a parallel session proposal if possible.

Curriculum Vitae

Liang Yu (14 August 1987) was born in Yantai (烟台), China. He obtained the degree of Bachelor of Law from Southwest Jiaotong University (2010), and the degree of Master of Law from Xiamen University (2013) in China. He started his PhD research in Maastricht University in September 2013. From March 2015 to May 2015, he was a visiting scholar in the Max Planck Institute for Comparative Public Law and International Law in Germany.

Publications during PhD career:

1.于亮:《<经济、社会和文化权利国际公约>中母国规制跨国公司的义务——兼评经济、社会和文化权利委员会的最新实践》,《环球法律评论》2014 年第 6 期.

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